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HEIGHT DISCRIMINATION IN EMPLOYMENT

Isaac B. Rosenberg*

This Article looks critically at heightism, i.e., prejudice or discrimination against a person on the basis of his or her height. Although much scholarship has focused on other forms of trait-based discrimination—most notably weight and appearance discrimination, both of which indirectly involve height as a component—little has focused on “pure” height discrimination. Nevertheless, within the past five years courts, scholars, and legislatures have increasingly tackled these non-traditional forms of discrimination. As such, this Article endeavors to fill the gap in the existing scholarship.

This Article specifically focuses on heightism in the workplace, with an emphasis on prejudice against short people because of the unique disadvantages they face vis-à-vis their taller counterparts. It examines the ways that existing federal antidiscrimination laws—namely Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990—do and do not protect against height-based prejudice in the workplace. Moreover, after briefly examining state and local remedies for height discrimination, including state antidiscrimination laws, this Article considers but ultimately rejects enacting a federal law that would flatly prohibit all height-based employment decisions. Although a comprehensive prohibition would be easiest to administer, such a prohibition would prove both gratuitous and unwise. Instead, this Article recommends modest changes to federal regulations and increased state and local enforcement.

TABLE OF CONTENTS

I. INTRODUCTION	908
II. THE REALITIES OF HEIGHT DISCRIMINATION	910
A. <i>Heightism, Generally</i>	910
B. <i>The Impact of Heightism in Employment</i>	914
III. HEIGHT DISCRIMINATION AND TITLE VII	915
A. <i>The “Traditional” Approaches</i>	917

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1. <i>Height Restrictions Under a Disparate Impact Theory</i>	917
2. <i>Height Restrictions as Pretext Under a Disparate Treatment Theory</i>	919
3. <i>Height-Based Animus with a Demonstrable Nexus to a Protected Trait</i>	920
B. <i>A New Approach: Height as a Form of Gender Stereotyping</i>	921
1. <i>The Theory</i>	921
2. <i>The Approach</i>	925
IV. HEIGHT DISCRIMINATION AND THE AMERICANS WITH DISABILITIES ACT	927
A. “ <i>Actual Impairment</i> ”	928
1. <i>Statutory and Regulatory Framework</i>	928
2. <i>Extreme Short Stature Constitutes an Impairment</i>	929
3. “ <i>Substantially Limits a Major Life Activity</i> ”	938
B. “ <i>Regarded As</i> ” <i>Impaired</i>	939
V. ADDITIONAL PROTECTIONS AGAINST HEIGHT DISCRIMINATION	942
A. <i>State and Local Laws</i>	942
1. <i>Common Law Tort</i>	942
2. <i>State and Local Antidiscrimination Laws</i>	943
B. <i>Why a Federal Prohibition on Height Discrimination Is Unnecessary</i>	945
1. <i>Such a Prohibition Would Be Overinclusive</i>	945
2. <i>Overinclusion Would Not Be Justified</i>	946
C. <i>A Proposal</i>	949
VI. CONCLUSION	950

I. INTRODUCTION

*“Well, I don’t want no Short People
Don’t want no Short People
Don’t want no Short People
Round here.”¹*

At first blush, the concept of *real* height discrimination is almost laughable. After all, we do not typically think of height when we discuss types of discrimination.² Yet there is no denying that we place a high premium on height,

¹ RANDY NEWMAN, *Short People*, on LITTLE CRIMINALS (Warner Bros. Records 1977).

² See LESLIE F. MARTEL & HENRY B. BILLER, STATURE AND STIGMA: THE BIOPSYCHOSOCIAL DEVELOPMENT OF SHORT MALES 2 (1984). Despite the palpably strong relationship between height, behavior, and personality, researchers largely ignored the issue until the advent of synthetic growth hormone therapy. See *id.* at 3–4. As one researcher speculated, “I think the whole problem makes everybody nervous all around with short people themselves wishing the issue would just go away, [and] normal sized people wishing short people would just go away.” *Id.* at 3 (quoting RALPH KEYES, THE HEIGHT OF YOUR LIFE 92 (1980)) (alterations in original).

be it social, sexual, or economic, and our preference for height pervades almost every aspect of our lives. Economist John Kenneth Galbraith—who towered at six feet eight inches³—described the favored treatment we afford taller people as one of the “most blatant and forgiven prejudices” in our society.⁴ If you do not believe it, consider whether you yourself would like to be taller and try putting your finger on the reason why, or why not.⁵

This Article looks critically at heightism, i.e., prejudice or discrimination against a person on the basis of his or her height.⁶ It specifically focuses on heightism in the workplace, particularly prejudice against short people because of the unique disadvantages they face compared with their taller counterparts. Although much scholarship has focused on other forms of trait-based discrimination—most notably discrimination based on weight⁷ and appearance,⁸ both of which indirectly involve height as a component—little if any scholarship has focused on “pure” height discrimination.⁹ Thus, this Article aims to fill that

³ See N.R. Kleinfeld, *For Tall Executives: Two Bumps A Day, \$600 An Inch*, N.Y. TIMES, Mar. 8, 1987, at A6.

⁴ See *id.* (internal quotation marks omitted) (quoting Arthur Ungur, *Galbraith: Turning Economics to Show Biz*, CHRISTIAN SCIENCE MONITOR, May 18, 1977, at 22). Galbraith went on to observe: “We tall men, being higher than anybody else, are much more visible and thus more closely watched. Therefore it follows that our behavior is naturally superior. So the world instinctively and rightly trusts tall men.” *Id.*; see also Robert Fulford, *It’s A Tall World, After All*, THE GLOBE AND MAIL, Oct. 13, 1993, at C1. (“Height remains one of the last frontiers of unabashed prejudice.”).

⁵ See STEPHEN S. HALL, *SIZE MATTERS: HOW HEIGHT AFFECTS THE HEALTH, HAPPINESS, AND SUCCESS OF BOYS—AND THE MEN THEY BECOME* 270 (2006) (“It’s a no-brainer. . . . Everyone wants to be taller. If you’re five-ten, you want to be six-two.”).

⁶ Credit for “heightism” goes to sociologist Saul Feldman, who coined the phrase in the early 1970s. See *Heightism*, TIME, Oct. 4, 1971, at 64.

⁷ See, e.g., Molly Henry, Note, *Do I Look Fat? Perceiving Obesity as a Disability Under the Americans with Disabilities Act*, 68 OHIO ST. L.J. 1761 (2007); Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25 (1997); Elizabeth Kristen, Comment, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57 (2002); Karol V. Mason, Note, *Employment Discrimination Against the Overweight*, 15 U. MICH. J.L. REFORM 337 (1982).

⁸ See, e.g., Elizabeth M. Adamitis, Comment, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 196 (2000); Heather R. James, Note, *If You Are Attractive and You Know It, Please Apply: Appearance Based Discrimination and Employers’ Discretion*, 42 VAL. U. L. REV. 629, 660 (2008); Karen Zakrzewski, Comment, *The Prevalence of “Look”ism in Hiring Decisions: How Federal Law Should be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431, 432 (2005).

⁹ Paul Steven Miller, a former commissioner of the U.S. Equal Employment Opportunity Commission who now serves as both Henry M. Jackson Professor of Law and Director of the Disability Studies Program at the University of Washington, wrote a thoughtful piece more than twenty years ago about workplace discrimination against little people who suffer from no other physical impairments, emphasizing liability under the Rehabilitation Act of 1973. See Paul Steven Miller, Note, *Coming Up Short: Employment Discrimination Against Little People*, 22 HARV. C.R.-C.L. L. REV. 231 (1987).

gap by examining how existing federal antidiscrimination laws—namely Title VII and the Americans with Disabilities Act of 1990—do and do not protect against height-based prejudice in the workplace.

Part II explores the pervasiveness of heightism generally and its specific impact on hiring, wages, and other aspects of employment. Part III looks at the various ways plaintiffs have pursued height-based claims under Title VII and suggests a new approach to such claims: characterizing heightism, in some cases, as a kind of impermissible gender stereotyping. Part IV considers height under the ADA—including the ADA Amendments Act of 2008—and contends that height outside the “normal range,” as defined by this Article, qualifies as an “impairment”; Part IV also considers height-based claims under the ADA’s “regarded as” prong. Finally, Part V briefly examines state and local remedies for height discrimination, including state common law and antidiscrimination laws, and considers whether Congress should enact a comprehensive height discrimination law flatly prohibiting height-based employment decisions. Part V concludes that, although a comprehensive prohibition would be easiest to administer, such a prohibition would prove both gratuitous and unwise. Rather, modest amendments to the federal regulations and increased state and local enforcement should suffice.

II. THE REALITIES OF HEIGHT DISCRIMINATION

A. Heightism, Generally

Heightism is instinctive. We cannot help making subconscious height-based comparisons.¹⁰ We engage in “gaze behavior”—a primitive way of establishing social hierarchies on the basis of whether we are looking up to or down on another—whenever we encounter someone.¹¹ To those we look down on, we ascribe less social power and negative character traits.¹² We even afford short people less personal space.¹³ Those we look up to, however, enjoy a “halo effect,”

¹⁰ See MARTEL & BILLER, *supra* note 2, at 35 (citing SEYMOUR FISHER, *BODY EXPERIENCE IN FANTASY AND BEHAVIOR* (1970)).

¹¹ See *id.* at 34.

¹² See *id.* at 34–35 (citing RALPH KEYES, *THE HEIGHT OF YOUR LIFE* 92 (1980)); see also David E. Sandberg & Melissa Colman, *Assessment of Psychosocial Aspects of Short Stature*, 21 *GROWTH, GENETICS & HORMONES* 17, 19 (2005) (“With few exceptions, both children and adults attribute significantly less favorable characteristics to short individuals compared to those of tall or average height.”) (citations omitted); *Short Guys Finish Last; Heightism*, *THE ECONOMIST*, Dec. 23, 1995, at 19 [hereinafter *Short Guys Finish Last*] (“Both men and women, whether short or tall, thought that short men—heights between 5’2’ and 5’5”—were less mature, less positive, less secure, less masculine; less successful, less capable, less confident, less outgoing; more inhibited, more timid, more passive; and so on.”).

¹³ See MARTEL & BILLER, *supra* note 2, at 35 (citing Kent G. Bailey et al., *Body Size as Implied Threat: Effects on Personal Space and Person Perception*, 43 *PERCEPTUAL &*

the automatic attribution of positive personality characteristics to them because of their height.¹⁴ This is perhaps most evident in our selection of presidents.¹⁵ We almost always elect the taller presidential candidate.¹⁶ In fact, we have not elected a shorter-than-average president since 1896¹⁷ and have elected scarcely a half-dozen short presidents overall.¹⁸ Furthermore, a candidate's margin of victory derives, in part, from his height.¹⁹

Heightism is also inculcated. Our language is rife with heightist idioms.²⁰ As children, we are constantly reminded of how much we have grown, and we are

MOTOR SKILLS 223, 223–30 (1976)). One study showed that we accord more than twice as much personal space to tall people than we do to short people. *See id.* (quoting J.J. Hartnett et al., *Body Height, Position, and Sex as Determinants of Personal Space*, 87 J. PSYCHOL. 129, 134 (1974)).

¹⁴ *See id.* at 36 (citing Edward L. Thorndike, *A Constant Error in Psychological Ratings*, 4 J. APPLIED PSYCHOL. 25, 25 (1920)).

¹⁵ So much so that one dedicated journalist has spent the past twenty years reminding us how much we care about how tall our president is. *See generally* Jay Mathews, *Is Voting a Measured Decision?*, WASH. POST, Aug. 12, 2008, at C1; Jay Mathews, *The Election: It's Inching Down on Us; Height Used to Matter to Voters, but Things May Be Looking up for Shorter Candidates*, WASH. POST, Dec. 29, 2003, at C1; Jay Mathews, *Tall Tales & Presidential Timber; Taking Full Measures Long Before November*, WASH. POST, Mar. 8, 1992, at C4; Jay Mathews, *Politics & the Height of Bias: And Now, a Short Word*, WASH. POST, June 12, 1988, at F1.

¹⁶ *See* Nicola Persico et al., *The Effect of Adolescent Experience on Labor Market Outcomes: The Case of Height*, 112 J. POL. ECON. 1019, 1020 (2004) (observing in 2004 that, “[i]n the past 13 U.S. presidential elections, the taller candidate has won 10 times”); *see also* Open N.Y., *The Measure of a President*, N.Y. TIMES, Oct. 6, 2008, available at <http://www.nytimes.com/interactive/2008/10/06/opinion/06opchart.html> (indicating that the taller candidate has won nineteen of the last twenty-nine elections dating back to 1896). Including George W. Bush's victory over the taller John Kerry in 2004 and Barack Obama's victory over the shorter John McCain in 2008, the shorter candidate has won only four of the past fourteen elections. *See id.*

¹⁷ *See* Timothy A. Judge & Daniel M. Cable, *The Effect of Physical Height on Workplace Success and Income: Preliminary Test of a Theoretical Model*, 89 J. APPLIED PSYCHOL. 428, 428 (2004). President McKinley, who was first elected in 1896, was only 5'7"—and was ridiculed for being a “little boy.” *See id.*

¹⁸ *See* Persico, *supra* note 16, at 1021, fig.1. James Madison was the shortest at 5'4”. *See id.*

¹⁹ *See* Stewart J.H. McCann, *Height, Societal Threat, and the Victory Margin in Presidential Elections (1824-1992)*, 88 PSYCHOL. REPORTS 741, 741–42 (2001).

²⁰ Compare sayings that underscore the disadvantages of being short or small (short shrift; coming up short; short end of the stick; caught short; draw the short straw; short change; feel small) with those that highlight the virtues of being big or tall (look up to someone; big man on campus; head and shoulders above the rest; stand tall; be the bigger person; make it big).

encouraged to “eat our vegetables” and “drink milk” so we can grow up to be “big and strong.”²¹

Even science has contributed to negative perceptions of short stature. In the early twentieth century, eugenists identified short stature as an inferior trait,²² and scientists thereafter set out to fix the “problem.”²³ In the 1950s, scientists began treating some slow-growing children with human growth hormone (HGH) extracted from the pituitary glands of cadavers, but such treatment was administered only to those with diagnosed medical deficiencies because of limited supply.²⁴ In the mid-1980s, however, the number of people receiving HGH treatment exploded with the advent of synthetic HGH, and included many who suffered from no diagnosable growth disorders.²⁵ Although much of the ensuing debate over HGH focused on whether *shortness* (as opposed to *growth* deficiency) constituted a disease in itself,²⁶ the underlying issue about which all seemed to agree was how bad it is to be short.²⁷ Proponents of greater availability of HGH focused on the fact that being short “handicaps a [person] in the competition for schools, jobs, income, and ‘mates.’”²⁸ Ultimately, the wider availability of HGH

²¹ See MARTEL & BILLER, *supra* note 2, at 19; see also *Short Guys Finish Last*, *supra* note 12 (“As boys grow, the importance of height is drummed into them incessantly. ‘My, how tall you are!’ the relatives squeal with approval. Or, with scorn, ‘Don’t you want to grow up big and strong?’”).

²² Eugenist Charles Davenport investigated the inheritance of height. See Charles B. Davenport, *Inheritance of Stature*, 2 GENETICS 313, 315–17 (1917). Davenport’s peers, Madison Grant and Lothrop Stoddard, promoted the inferiority of certain ethnic groups because of their “dwarfish stature.” See also ROBERT MICHAEL, *A CONCISE HISTORY OF AMERICAN ANTISEMITISM* 130 (2005) (noting that one scholar viewed Jews as having a “dwarfish stature”). Vernon Kellogg went so far as to criticize military conscription, on the eve of World War I, because drafts and war lessened the genetic stock of a nation; the derivative loss of tall, strong men to war diminished “the stature of the next generation.” Vernon Kellogg, *Eugenics and Militarism*, THE ATLANTIC MONTHLY, July 1913, at 105.

²³ One article published in a prominent pediatric journal described it as “[t]he Disability of Short Stature.” See C.M. Law, *The Disability of Short Stature*, 62 ARCHIVES OF DISEASE IN CHILDHOOD 855, 855 (1987). Another article characterized children of short stature as “psychologically handicapped.” See Melvin M. Grumbach, *Growth Hormone Therapy and the Short End of the Stick*, 319 NEW ENG. J. MED. 238, 240 (1988); cf. Patrik K.E. Magnusson et al., *Strong Inverse Association Between Height and Suicide in a Large Cohort of Swedish Men: Evidence of Early Life Origins of Suicidal Behavior?*, 162 AM. J. PSYCHIATRY 1373, 1374 (2005) (finding that short men are twice as likely to commit suicide as tall men, perhaps as a result of poor childhood socialization, lower social class in adulthood, childhood stress, stigmatization and discrimination, and higher risk of psychosis).

²⁴ See Dov Fox, *Safety, Efficacy, and Authenticity: The Gap Between Ethics and Law in FDA Decisionmaking*, 2005 MICH. ST. L. REV. 1135, 1179–80 (2005).

²⁵ See *id.*

²⁶ See CARL ELLIOTT, *BETTER THAN WELL: AMERICAN MEDICINE MEETS THE AMERICAN DREAM* 241 (2003).

²⁷ See *id.*

²⁸ *Id.* (citations omitted).

treatment made more people view short stature as a problem to be fixed.²⁹ Perhaps that explains why more and more short—but otherwise healthy—adults have turned to “limb lengthening” to combat the stigma of short stature.³⁰

Yet even though our instinctive and inculcated preference for height is pervasive, we do not generally acknowledge its existence.³¹ There may be two reasons for this:

Either the awareness regarding discrimination is not in the consciousness of one or both individuals in a particular social situation, or verbalization of the discrimination is suppressed. The result is that the short [person] feels that something is subtly awry, but he cannot pin it down. He may believe that this discrimination is based on the social feedback that he does not look quite right, that he falls significantly short of the cultural ideal for height.³²

Strive as victims of height discrimination may, combating heightism is “like fighting a ghost.”³³

²⁹ Joel Frader, a doctor and ethicist in the Medical Humanities and Bioethics Program at Northwestern University, characterized the FDA’s decision to approve expanded availability and use of HGH as “tragic” because it “medicalized short stature and turned it into an illness.” HALL, *supra* note 5, at 245.

³⁰ Limb lengthening is an expensive and painful procedure by which a surgeon “divides a long bone into two or more sections, separates the sections slightly and braces the bone and limb with metal ‘scaffolding,’” then adjusts the pins and screws on this frame “to keep tension between the sections, enabling the bone to grow back together gradually into a complete but longer bone.” MayoClinic.com, Dwarfism: Treatments and Drugs, <http://www.mayoclinic.com/health/dwarfism/DS01012/DSECTION=treatments-and-drugs> (last visited Sept. 1, 2009); *see also* Caitlin Gibson, *Growing Pains: For Caitlin Schroeder, Achieving Near-Average Height Would Require No Small Act of Courage*, WASH. POST, Nov. 30, 2008, at W10 (describing the procedure and its sometimes painful consequences); Joe Kita, *All to be Tall*, MEN’S HEALTH, Jan/Feb 2004, at 132–35 (describing leg lengthening procedure).

Limb lengthening is particularly popular in China, where thousands of otherwise healthy Chinese people who fear height discrimination undergo the procedure. *See* Xun Zeng, *Enforcing Equal Employment Opportunities in China*, 9 U. PA. J. LAB. & EMP. L. 991, 1002 (2007); *see also* Joe Kita & Lee Kynaston, *Men Who Risk It All to be Tall*, THE INDEPENDENT, Apr. 5, 2004, at 8 (noting an increase among short men in England who turn to limb lengthening as a cosmetic procedure).

³¹ *See* MARTEL & BILLER, *supra* note 2, at 38 (“Discrimination against short males, although often subtle, remains a powerful factor in their lives. . . . Society positively frames an identity for the short female by labeling her as ‘cute’ or ‘dainty,’ while the short boy is just plain short.”).

³² *Id.*

³³ *Id.* (quoting RALPH KEYES, *THE HEIGHT OF YOUR LIFE* 92 (1980)).

B. The Impact of Heightism in Employment

No matter its source, the problem is prejudice.³⁴ Height-based prejudice permeates employment decisions—perhaps as much as race and gender.³⁵ It begins with hiring. For example, when researchers asked a group of recruiters to make a hypothetical hiring decision between two equally qualified candidates who differed only in height, 72 percent of the recruiters chose the taller candidate.³⁶

Height also affects wages. Data suggest that every additional inch in height is associated with a 1.8 to 2.2 percent increase in wages³⁷—or roughly \$789 per inch, per year.³⁸ Moreover, the tallest 25 percent of the population gets a 13 percent boost in median income compared with the shortest 25 percent.³⁹ In socially oriented jobs such as sales and management, height was shown to be predictive of earnings.⁴⁰ Although some speculate that taller people earn more because of a correlation between height and intelligence,⁴¹ studies controlling for intelligence continue to find a significant relationship between height and earnings.⁴² Similarly controlling for gender, height continues to affect wages.⁴³ Height's effect does not decline over time; in fact, its importance may even increase as we age.⁴⁴

Finally, height affects professional advancement. Height impacts self-esteem (how individuals regard themselves) and social esteem (how individuals are regarded by others), which in turn affect actual job performance, *perceived* job performance, and, ultimately, professional success.⁴⁵ It is hardly a coincidence that 58 percent of Fortune 500 CEOs are six feet or taller (compared with roughly 14.5 percent of all men) and 30 percent are 6'2" or taller (compared with 3.9 percent of

³⁴ *Id.* at 36 (quoting JOHN S. GILLIS, *TOO TALL TOO SMALL* 61 (1982)).

³⁵ See Persico, *supra* note 16, at 1020–21. In fact, one economist has suggested that “[t]he gross mistake is that much of what we normally assume is sex discrimination is height discrimination. Of course, heightism affects both men and women, but because women average 4 to 5 inches shorter than men, it affects [women] more.” Dennis D. Miller, *Ending Job Bias Can Be a Tall Order*, WALL ST. J., Oct. 28, 1995, at 1.

³⁶ See MARTEL & BILLER, *supra* note 2, at 38; see also *Short Guys Finish Last*, *supra* note 12, at 20 (noting the results of one study conducted in 1969).

³⁷ See Persico, *supra* note 16, at 1021.

³⁸ See MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 88 (2005).

³⁹ HALL, *supra* note 5, at 185.

⁴⁰ See Judge & Cable, *supra* note 17, at 436–37. Although height was found to be less significant in less socially driven occupations, it still had an effect. *Id.*

⁴¹ See Julian V. Roberts & C. Peter Herman, *The Psychology of Height: An Empirical Review*, in 3 *PHYSICAL APPEARANCE, STIGMA, AND SOCIAL BEHAVIOR: THE ONTARIO SYMPOSIUM* 113, 122 (C. Peter Herman et al. eds., 1986).

⁴² See Judge & Cable, *supra* note 17, at 436.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

all men).⁴⁶ One business expert has suggested that an additional four inches in height “make[s] much more difference in terms of success in a business career than any paper qualifications you have” and that it would be better to be “5 ft. 10 and a graduate of N.Y.U.’s business school than 5 ft. 6 and a Harvard Business School graduate.”⁴⁷ Another commentator concluded that “being short is probably as much, or more, of a handicap to corporate success as being a woman or an African American.”⁴⁸

In sum, heightism tangibly affects employment decisions involving short employees. Because this type of discrimination is subtle, however, many who fall prey to it may not realize, or even think to realize, that it motivated decisions against them.⁴⁹ Nevertheless, where victims of height discrimination suspect that adverse employment actions were motivated by their height, the question remains, what remedies are available under federal law?

III. HEIGHT DISCRIMINATION AND TITLE VII

Title VII of the Civil Rights Act of 1964 generally prohibits employers from discriminating against applicants or employees because of their race, religion, national origin, color, or sex.⁵⁰ An employer can violate Title VII under two basic theories. The first theory, disparate impact, involves “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another.”⁵¹ This theory requires no showing of discriminatory motive.⁵² The second theory, disparate treatment, involves treating some less favorably than others *because of* their protected status.⁵³ This theory necessarily requires a showing of discriminatory motive, be it express or implied.⁵⁴

⁴⁶ See GLADWELL, *supra* note 38, at 86–87. A 1980 survey showed that only 3 percent of Fortune 500 CEOs were 5’7” or shorter. See *Short Guys Finish Last*, *supra* note 12, at 20.

⁴⁷ Georgia Harbison, *A Chance to Be Taller*, TIME, Jan. 8, 1990, at 70. Moreover, CEOs would rather be bald than short. See Del Jones, *The Bald Truth About CEOs; Executives Say They’d Rather Have No Hair Than Be Short*, USA TODAY, Mar. 14, 2008, at 1B.

⁴⁸ GLADWELL, *supra* note 38, at 87; see also Judge & Cable, *supra* note 17, at 438.

⁴⁹ This may explain why, in those jurisdictions explicitly protecting against height discrimination, so few cases have been brought. See *infra* notes 287–292 and accompanying text.

⁵⁰ See 42 U.S.C. § 2000e-2(a) (2006).

⁵¹ *Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) (citing *Int’l Bhd. of Teamsters v. United States* 431 U.S. 324, 335–36 n.15 (1977)).

⁵² See *Teamsters*, 431 U.S. at 335–36 n.15.

⁵³ See *id.*

⁵⁴ See *id.* (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977)).

Under either theory, a plaintiff must make out a prima facie case,⁵⁵ which an employer can rebut by (1) defeating the inference of discrimination, in disparate treatment cases;⁵⁶ (2) undermining the evidence of causation, in disparate impact cases;⁵⁷ or (3) marshaling an affirmative defense.⁵⁸ This Part, however, examines only how height fits into the prima facie case as a matter of law. The post-prima facie case inquiry is incredibly fact sensitive⁵⁹ and therefore beyond the scope of this Article, which considers merely whether height-based claims are legally cognizable.

To that end, this Part has two subsections. The first subsection analyzes claims brought under what one might call the “traditional” approaches, which have involved challenges to (1) facially neutral height restrictions under a disparate impact theory; (2) the uneven application of height restrictions as a pretext under a disparate treatment theory; and (3) height-based animus that has some demonstrable nexus to a protected trait under a disparate treatment theory. The second subsection suggests a new approach to height-based claims: challenging height-based disparate treatment as a form of impermissible gender stereotyping.

⁵⁵ For a disparate treatment theory, a plaintiff must show: “(1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action, [i.e., a failure to hire, a failure to promote, or termination]; and (4) circumstances that support an inference of discrimination.” *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510 (2002) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–54 n.6 (1981)). For a disparate impact theory, a plaintiff must show merely that a *specific* facially neutral employment practice negatively and disproportionately affects one group over another. *See* 42 U.S.C. § 2000e-2(k)(1)(A) (2006); *see also* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (determining that a plaintiff must identify a specific employment practice).

⁵⁶ *See McDonnell Douglas*, 411 U.S. at 802 (“The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”).

⁵⁷ *See* 42 U.S.C. § 2000e-2(k)(1)(B) (2006); *cf.* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 & n.8 (1989) (recognizing that an employer could rebut a disparate impact claim “if [the employer] could show that the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite”); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977) (“We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted.”).

⁵⁸ For example, the employer could show in a disparate treatment case that religion, sex, or national origin (but not race or color) is a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e)(1) (2006). In disparate impact cases, the employer could show that the “challenged practice is job related for the position in question . . . consistent with business necessity,” *id.* § 2000e-2(k)(1)(A)(i), and that “there are [no] other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class.” *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005).

⁵⁹ *Cf. McDonnell Douglas*, 411 U.S. at 802–03 (“We need not attempt in the instant case to detail every manner which fairly could be recognized as a reasonable basis for a refusal to hire.”).

A. The “Traditional” Approaches

1. Height Restrictions Under a Disparate Impact Theory

As noted above, a disparate impact theory requires the plaintiff to point to a specific employment practice that adversely and disproportionately affects a protected group.⁶⁰ This most commonly arises when an employer implements some sort of minimum height restriction. Such restrictions tend to adversely impact women and certain racial and ethnic groups.

With respect to gender, in the seminal *Dothard v. Rawlinson*,⁶¹ an Alabama statute required that prison guards stand at least 5’2” and weigh 120 pounds.⁶² The Supreme Court found that the minimum height and weight restrictions violated Title VII because, when combined, they would exclude 41.13 percent of the female population while excluding less than 1 percent of the male population.⁶³

Conversely, in *Livingston v. Roadway Express, Inc.*,⁶⁴ a 6’7” white male plaintiff was rejected for employment as a truck driver because of the company’s 6’4” maximum height limitation for the position.⁶⁵ Livingston alleged reverse sex discrimination under Title VII because the restriction had a disparate impact on males.⁶⁶ Statistical evidence showed that 0.9 percent of adult men were 6’4” or taller, whereas only 0.3 percent of women were 5’11” or taller; thus, the height maximum excluded three times as many men as women.⁶⁷ Nevertheless, the Tenth Circuit rejected the reverse discrimination claim because it determined that “in impact cases, as in disparate treatment cases, a member of a favored group [like men] must show background circumstances supporting the inference that a facially neutral policy with a disparate impact is in fact a vehicle for unlawful discrimination,” which the plaintiff had failed to do.⁶⁸

Plaintiffs also have challenged minimum height restrictions for their disparate impact on people of certain races and national origins—namely, Asians and

⁶⁰ See *supra* note 51 and accompanying text.

⁶¹ 433 U.S. 321 (1977).

⁶² *Id.* at 323–24.

⁶³ *Id.* at 329–31; *cf.* 28 C.F.R. § 50.14, pt.1 § 4(D) (2008) (“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact . . .”).

Another named plaintiff, a woman who applied for a position as a state trooper, successfully challenged the 5’9” height requirement and the 160-pound weight requirement for the position under the Equal Protection Clause. *Dothard*, 433 U.S. at 324 n.4.

⁶⁴ 802 F.2d 1250 (10th Cir. 1986).

⁶⁵ *Id.* at 1251.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1252–53.

Hispanics. In *League of United Latin American Citizens v. City of Santa Ana*,⁶⁹ the City of Santa Ana imposed minimum height requirements for its police and fire departments.⁷⁰ Although Mexican Americans constituted 25.8 percent of the city's general population, they made up only 9.2 percent of the city's police force and 4.5 percent of its fire department.⁷¹ The district court found that the height requirements had served to deter Mexican American applicants,⁷² and disqualified two to three times as many Mexican American applicants as Caucasian applicants.⁷³ Ultimately, the court determined "it [was] clear that by . . . the use of an arbitrary height requirement, the defendants were responsible for preventing substantial numbers of Mexican-Americans from taking the [qualification] tests in the first place."⁷⁴

Likewise, in *Sondel v. Northwest Airlines*,⁷⁵ a 4'11" woman of Sri Lankan descent⁷⁶ applied for but was denied a position as a flight attendant and filed charges with the EEOC alleging that the airline's height requirement discriminated against women, Asians, and Hispanics.⁷⁷ The EEOC found that the airline's 5'2" minimum height requirement did in fact exclude women, especially Hispanic and Asian women, from employment opportunities as flight attendants.⁷⁸ And in *Officers for Justice v. Civil Service Commission of the City and County of San Francisco*,⁷⁹ plaintiffs challenged the defendant commission's use of a 5'6" preselection height minimum for patrol officers as discriminatory against Asians, Hispanics, and women.⁸⁰ The district court agreed.⁸¹

⁶⁹ 410 F. Supp. 873 (C.D. Cal. 1976).

⁷⁰ *Id.* at 879.

⁷¹ *Id.*

⁷² *Id.* at 881.

⁷³ *Id.* at 882.

⁷⁴ *Id.* at 893.

⁷⁵ 1993 U.S. Dist. LEXIS 21436, at *6 (D. Minn. Jan. 14, 1993) [hereinafter *Sondel I*]; see also *Sondel v. Nw. Airlines, Inc.*, 1993 U.S. Dist. LEXIS 21252, at *6 (D. Minn. Sept. 30, 1993) [hereinafter *Sondel II*].

⁷⁶ *Sondel II*, 1993 U.S. Dist. LEXIS 21252, at *2. In *Sondel II*, the *Sondel I* plaintiff joined forces with other rejected applicants to seek class certification, alleging discrimination on the basis of race, color, gender, and national origin. *Sondel II*, 1993 U.S. Dist. LEXIS 21252, at *1. Among the other plaintiffs was Stephanie Chung, a 5'0" woman of Korean descent. *Id.* at *4.

⁷⁷ *Sondel I*, 1993 U.S. Dist. LEXIS 21436, at *1-2.

⁷⁸ *Sondel II*, 1993 U.S. Dist. LEXIS 21252, at *6-7.

⁷⁹ 395 F. Supp. 378 (N.D. Cal. 1975).

⁸⁰ *Id.* at 380.

⁸¹ *Id.* In so finding, the district court did not even consider the general census data offered by the plaintiffs, which indicated that the average height of Asians and Hispanics was lower than that of African Americans or Caucasians, because the discriminatory impact "[was] clear from the height data on the applicants" themselves. *Id.* But see *Arnold v. Ballard*, 390 F. Supp. 723, 727, 738 (N.D. Ohio 1975) (finding that the Akron Police Department's minimum height requirement did not disqualify a disproportionate number of

2. *Height Restrictions as Pretext Under a Disparate Treatment Theory*

Some plaintiffs have successfully brought disparate treatment claims by showing that a facially neutral height restriction was a pretext for intentional discrimination where the employer applied the restriction unevenly to different groups. For example, in *United States v. Lee Way Motor Freight, Inc.*,⁸² a trucking company had instituted a 5'7" minimum height requirement for its drivers, which it strictly enforced against minority applicants;⁸³ the company selectively enforced the height restriction for white applicants who did not meet the minimum.⁸⁴ The court found that the selective application of the height restriction to minorities violated Title VII.⁸⁵

Similarly, in *Schick v. Bronstein*,⁸⁶ the male plaintiff applied for a position as a patrolman in the New York City Police Department but was rejected because he failed to meet the 5'7" minimum height requirement in effect when he applied.⁸⁷ The police department also did not hire women as patrol officers when the plaintiff submitted his application.⁸⁸ Shortly after he was rejected, the police department began hiring women as patrol officers and dropped the height requirement for all applicants.⁸⁹ When the plaintiff reapplied for the job, however, the police department continued to apply the height restriction to him.⁹⁰ The court determined that the department's continued application of the height restriction to the plaintiff, when no such height requirement was applied to female applicants, "constituted a refusal of employment based on sex, in violation of Title VII."⁹¹

African American applicants and was not "used to facilitate a discriminatory attitude against" African Americans).

⁸² Civ. A. No. 72-445, 1980 U.S. Dist. LEXIS 9670, at *1 (W.D. Okla. Sept. 29, 1980).

⁸³ *Id.* at *13, *20.

⁸⁴ *Id.* at *20. *See also* Chi. Fire Fighters Union Local No. 2 v. City of Chicago, Civ. A. Nos. 87-7295, 89-7984, 93-5438, 93-6175, 96-808, 1999 U.S. Dist. LEXIS 20310, at *181 (N.D. Ill. Dec. 30, 1999) (upholding city's race-based affirmative action program for promotions within the fire department because a former fire commissioner had instituted pretextual job requirements—including minimum height requirements—to exclude minority applicants); *McNamara v. City of Chicago*, 959 F. Supp. 870, 875 (N.D. Ill. 1997) (same).

⁸⁵ *See* *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 924 (10th Cir. 1979) ("The magnitude of the statistics established a prima facie case that during this period race was a factor in staffing the two driver categories.").

⁸⁶ 447 F. Supp. 333 (S.D.N.Y. 1978).

⁸⁷ *Id.* at 334.

⁸⁸ *Id.* at 335. Women were hired as "policewomen," an ostensibly different job, and were required to meet a 5'2" minimum height requirement. *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 338. *See also* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 621(b)(1) (1991) [hereinafter "EEOC Interpretive Manual"].

The same theory applies to height maximums. For example, in *Laffey v. Northwest Airlines, Inc.*,⁹² an airline did not hire women as flight attendants if they were taller than 5'9" but did hire men who were as tall as 6'0".⁹³ The court determined that the airline had violated Title VII by imposing a shorter maximum height requirement on women than it imposed on men.⁹⁴

3. Height-Based Animus with a Demonstrable Nexus to a Protected Trait

Many Title VII suits have challenged height-based animus as a pretext for intentional discrimination on the basis of some protected trait. Most of these cases have failed, however, because the plaintiffs could not establish a nexus between the alleged height-based animus and a trait protected by the statute; that is, they failed to establish the requisite inference of discriminatory motive. In *Ekerman v. City of Chicago*,⁹⁵ for example, the plaintiff was a 4'10", ninety-two-pound female detective in the Chicago Police Department who brought a Title VII claim alleging gender discrimination.⁹⁶ She claimed that her work environment was unlawfully hostile because of a single, gender-neutral remark allegedly made by the deputy police chief, who "called out from behind her and said: 'Boy are you short. How tall are you? How can you do this job?'"⁹⁷ The district court granted summary judgment to the city, finding that Title VII did not generally prohibit height discrimination, that the statement was facially gender neutral, and that the plaintiff "offer[ed] no evidence to support a finding that the remark, despite being sex-neutral on its face, was actually made on account of her gender."⁹⁸

Similarly, in *Cortez v. Wal-Mart Stores, Inc.*,⁹⁹ the plaintiff had been repeatedly denied promotions to the positions of general manager of a Sam's Club and regional personnel manager at Walmart's home office.¹⁰⁰ He alleged that Walmart did not promote him on the basis of his age and race.¹⁰¹ The district court dismissed his race discrimination claim for lack of supporting evidence¹⁰² and found that, despite the fact that a regional vice president referred to him as "Shortez," the record did not support his bare allegations of endemic managerial

⁹² 366 F. Supp. 763 (D.D.C. 1973).

⁹³ *Id.* at 775.

⁹⁴ *Id.* at 790.

⁹⁵ Civ. A. No. 01-9686, 2003 U.S. Dist. LEXIS 3775, at *1 (N.D. Ill., Mar. 12, 2003).

⁹⁶ *Id.* at *2, *8.

⁹⁷ *Id.* at *7.

⁹⁸ *Id.* at *8. The court also dismissed the plaintiff's retaliation claim. *Id.* at *12-14. Although the plaintiff filed a report about the height-based comments, the court determined that filing such a report was not statutorily protected activity under Title VII because her subjective belief that the comments were motivated by sexual animus were unreasonable in the absence of proof of such animus. *Id.* at *10, *12.

⁹⁹ Civ. A. No. 03-1251, 2005 U.S. Dist. LEXIS 43817, at *1 (D.N.M. Jan. 14, 2005).

¹⁰⁰ *Id.* at *6.

¹⁰¹ *Id.*

¹⁰² *Id.* at *17-18.

favoritism for “non-Hispanic” characteristics, such as above-average height.¹⁰³ The district court in *Pena v. USX Corp.*¹⁰⁴ reached a similar conclusion on comparable facts.¹⁰⁵

B. A New Approach: Height as a Form of Gender Stereotyping

Although these traditional approaches have proven moderately successful, they continue to underachieve because they fail to capture one of the most significant components of height discrimination: gender stereotyping. As this subsection shows, many cases of height-based animus, especially animus directed toward short men and tall women, result from gender stereotyping.

1. The Theory

Height constitutes one of many significant factors that go into overall physical attractiveness, particularly for men, and “[i]t is almost axiomatic that short males are not attractive, or at least not as attractive as their taller counterparts.”¹⁰⁶ After all, we often describe the quintessential man as “tall, dark, and handsome.”¹⁰⁷ Relative height preoccupies men, and short men typically struggle to form a sense of physical adequacy and competency.¹⁰⁸ Women perceive short men as undesirable mates because they “do not strike [them] as true men.”¹⁰⁹ Research plainly shows that “[t]he universally acknowledged cardinal rule of dating and mate selection is that the male will be significantly taller than his female partner”¹¹⁰ and that “women are actively selecting for tallness when they go looking for male partners.”¹¹¹

¹⁰³ *Id.* at *23 n.8.

¹⁰⁴ Civ. A. No. 03-334, 2006 WL 623598, at *1 (N.D. Ind. Mar. 9, 2006).

¹⁰⁵ *Id.* at *11 (“In addition, the court declines to expand the ban on racial discrimination articulated in [Title VII and § 1981] to include harassment based on height for no better reason than the plaintiff’s unsupported conclusion that in his coworkers’ eyes, Mexicans were short and therefore all harassment based on height was racially motivated.”).

¹⁰⁶ MARTEL & BILLER, *supra* note 2, at 5.

¹⁰⁷ *Id.* (observing that *Ms. Magazine* ran an article entitled “Short, Dark and Almost Handsome”).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 25 (citing H.G. Beigel, *Body Height in Mate Selection*, 29 J. SOC. PSYCHOL. 257, 268 (1954)). For example, when 100 women of all heights between ages 18 and 22 were shown pictures of men whom they believed to be either short, average, or tall, all of the women found the tall men to be significantly more attractive than the short men. *See id.* at 26.

¹¹⁰ *Id.*

¹¹¹ BBC News, Tall Guys Get the Girls (Jan. 13, 2000), <http://news.bbc.co.uk/1/hi/sci/tech/600481.stm>.

More importantly, however, “large body size has a symbolic meaning to males that is unique to their gender.”¹¹² Put simply, we (both males and females) view large men as more manly.¹¹³ As such, short men struggle to negotiate and solidify positive male identity.¹¹⁴ Because we value bigness in men—in part because much of the normative male gender role involves offering security to self and others, which we assume smaller men are less capable (or even incapable) of providing—shortness in males manifests a failure to satisfy the norm.¹¹⁵

Conversely, because women are generally shorter than men and desire to be small,¹¹⁶ a tall woman may be perceived as defying her gender norm because of her uncharacteristic stature.¹¹⁷ Consider that endocrinologists in the 1950s prescribed hormones as growth suppressants for tall girls.¹¹⁸ Data collected in 1978 showed that up to one half of pediatric endocrinologists had offered estrogen to young women whose adult height they forecast to be greater than 6’1”.¹¹⁹ More recent data suggest this practice is out of fashion, although one in five pediatric endocrinologists had reported treating at least one girl for “tall stature” within the past five years.¹²⁰

Gender stereotyping theories of liability under Title VII have become increasingly popular and effective in recent years. Beginning in *Price Waterhouse v. Hopkins*,¹²¹ the Supreme Court held that, “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be

¹¹² MARTEL & BILLER, *supra* note 2, at 6. The preference for male height spans every culture. *See id.* at 33 (citing C.S. FORD & F.A. BEACH, *PATTERNS OF SEXUAL BEHAVIOR* (1951)). The preference for female body type is less consistent cross-culturally. *Id.*

¹¹³ *Id.* at 6 (citing SEYMOUR FISHER, *BODY CONSCIOUSNESS: YOU ARE WHAT YOU FEEL* 119 (1973)).

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.* at 8. “[T]he male whose body type does not conform to the traditional image of the ideal male, that of the tall mesomorph, may face severe difficulty in accepting himself and having others accept him as truly masculine and competent in the male role.” *Id.* at 32 (quoting A. Gasca & C.A. Borges, *The Male Physique and Behavioral Experience Expectancies*, 106 *J. PSYCHOL.* 97, 101 (1979)).

¹¹⁶ *See* MARTEL & BILLER, *supra* note 2, at 5 (citing G. Calden et al., *Sex Differences in Body Concepts*, 23 *J. CONSULTING PSYCHOL.* 378 (1959)).

¹¹⁷ *See id.* (“Femininity is often associated with petiteness and, at the very least, being large is seen as unfeminine whether it is being very tall or overweight.”); *see also* E. Brecher, *Will Perot Be The Short-Cut Chief, or Just Cut Short?*, *COURIER-MAIL*, June 11, 1992 (“[S]tudies have shown that bosses often reject tall women because they’re too threatening.”).

¹¹⁸ *See* ELLIOTT, *supra* note 26, at 242.

¹¹⁹ *Id.* (citing F.A. Conte & M.M. Grumbach, *Estrogen Use in Children and Adolescents: A Survey*, 62 *PEDIATRICS* 1091 (1978)).

¹²⁰ *Id.* (citing Neal D. Barnard et al., *The Current Use of Estrogens for Growth-Suppressant Therapy in Adolescent Girls*, 15 *J. PEDIATRIC & ADOLESCENT GYNECOLOGY* 23, 23–26 (2002)).

¹²¹ 490 U.S. 228 (1989).

aggressive, or that she must not be, has acted on the basis of gender.”¹²² The plaintiff, a senior manager for the defendant consulting firm, was passed over for partnership because, despite exhibiting desirable traits such as “strong character, independence and integrity,”¹²³ she just did not act “like a woman should.”¹²⁴ The Court concluded that “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”¹²⁵ Subsequently, in *Oncale v. Sundowner Offshore Services, Inc.*,¹²⁶ a unanimous Supreme Court recognized that there could be no absolute presumption under Title VII that a person of one gender would not discriminate against another person of the same gender.¹²⁷ As such, the Court determined that actionable sexual harassment “need not be motivated only by sexual desire to support an inference of discrimination”¹²⁸

Victims of discrimination on the basis of sexual orientation have successfully used this gender-stereotyping theory—despite the fact that sexual orientation is not protected under Title VII¹²⁹—to challenge workplace harassment under Title VII. Before *Price Waterhouse* and *Oncale*, however, same-sex harassment claims

¹²² *Id.* at 250.

¹²³ *Id.* at 234.

¹²⁴ *See id.* at 235 (“[S]ome of the partners reacted negatively to Hopkins’ personality because she was a woman. One partner described her as ‘macho’; another suggested that she ‘overcompensated for being a woman’; a third advised her to take ‘a course at charm school.’ Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only ‘because it’s a lady using foul language.’ Another supporter explained that Hopkins ‘ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate.’”).

¹²⁵ *Id.* at 251. The Court further noted that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’” *Id.* (emphasis added) (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (some internal quotation marks omitted).

¹²⁶ 523 U.S. 75 (1998).

¹²⁷ *Id.* at 78.

¹²⁸ *Id.* at 80.

¹²⁹ *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (“Further, this court has explicitly declined to extend Title VII protections to discrimination based on a person’s sexual orientation.” (citing *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005)); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (“[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII.”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 260–61 (3d Cir. 2001) (same); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (“The law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation.”).

typically failed at the motion to dismiss stage. In *Smith v. Liberty Mutual*,¹³⁰ for example, the plaintiff applied for a position as a mailroom clerk with the defendant employer, but was not hired because the interviewing supervisor thought his behavior was “effeminate.”¹³¹ The Fifth Circuit rejected the plaintiff’s gender discrimination claim because he failed to allege that he was discriminated against “because he was a male.”¹³² Instead, the plaintiff alleged discrimination because “as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive ‘effeminate’.”¹³³ The court determined that, because Title VII did not forbid discrimination on sexual preference, it did not prohibit the conduct alleged.¹³⁴ The Ninth Circuit came to a similar conclusion in *DeSantis v. Pacific Telephone & Telegraph Co.*¹³⁵

In *Nichols v. Azteca Restaurant Enterprises, Inc.*,¹³⁶ however, the Ninth Circuit overruled *DeSantis* in light of *Price Waterhouse* and *Oncala*.¹³⁷ The *Nichols* court found that “the systematic abuse directed at [the plaintiff],”¹³⁸ which “reflected a belief that [he] did not act as a man should act . . . [,] was closely linked to gender”¹³⁹ and thus in violation of Title VII.¹⁴⁰ Likewise, in *Bibby v. Philadelphia Coca Cola Bottling Co.*,¹⁴¹ the Third Circuit recognized that a plaintiff could prove same-sex harassment “was discrimination because of sex” using a gender stereotype theory,¹⁴² citing to similar holdings in the First, Second, and Seventh Circuits.¹⁴³

¹³⁰ 569 F.2d 325 (5th Cir. 1978).

¹³¹ *Id.* at 326.

¹³² *Id.* at 327.

¹³³ *Id.*

¹³⁴ *Id.* at 326–27 (citing *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc)).

¹³⁵ 608 F.2d 327, 329–30 (9th Cir. 1979).

¹³⁶ 256 F.3d 864 (9th Cir. 2001).

¹³⁷ *Id.* at 874–75.

¹³⁸ *Id.* at 874. Specifically, “[m]ale co-workers and a supervisor repeatedly referred to [the plaintiff] in Spanish and English as ‘she’ and ‘her.’ Male co-workers mocked [him] for walking and carrying his serving tray ‘like a woman,’ and taunted him in Spanish and English as, among other things, a ‘faggot’ and a ‘fucking female whore.’” *Id.* at 870.

¹³⁹ *Id.* at 874.

¹⁴⁰ *Id.* at 875.

¹⁴¹ 260 F.3d 257 (3d Cir. 2001).

¹⁴² *Id.* at 262–64. However, the *Bibby* plaintiff failed to prove this theory because “he did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave.” *Id.* at 264.

¹⁴³ *Id.* at 263; *see also* *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (upholding the district court’s dismissal of a same-sex harassment claim where plaintiff’s co-workers “repeatedly assaulted him with such comments as ‘go fuck yourself, fag,’ ‘suck my dick,’ and ‘so you like it up the ass?’”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (denying same-sex harassment claim on appeal because, despite evidence that co-workers mocked plaintiff’s supposedly effeminate characteristics, plaintiff presented that evidence to the district court only as an example of discrimination

Turning back to height, discrimination against a short man because he is short is, in effect, discrimination against him because his short stature manifests his failure to satisfy the male gender norm, i.e., because he is less manly than he ought to be. Likewise, discrimination against a tall woman because of her tall stature can be premised on an impermissible gender stereotype. Such discrimination would arguably fall within the contours of Title VII's prohibition against gender-based discrimination.

2. *The Approach*

Although pervasive, height discrimination in the workplace is often latent, manifesting predominantly either in failures to hire or promote, or in disparate wages. As a result, the "traditional" approaches tend to break down: the disparate impact claim approach underachieves because, in many cases, employers will not have an express policy of height discrimination in hiring, promotion, or wages; and, the individual disparate treatment approach typically fails because discrete instances of height-based animus have proved hard to connect to a protected trait.¹⁴⁴

There remains a third theory, however, that combines elements of both the individual disparate treatment and disparate impact theories and which responds nicely to the frailties of both theories in the context of height discrimination—namely, a systemic disparate treatment (or "pattern or practice") theory. A systemic disparate treatment theory still requires a showing of discriminatory intent in order to succeed,¹⁴⁵ but it permits an inference of such intent from a pattern of adverse outcomes or "bad stats."¹⁴⁶ Plaintiffs can prevail under such a theory if they can "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts"—that is, that discrimination was the employer's "standard operating procedure."¹⁴⁷ Put into context, a height discrimination plaintiff could establish impermissible gender stereotyping predicated on height by showing a pattern of adverse employment actions that disproportionately affect a protected group.¹⁴⁸ For example, while a short man might struggle to connect his

because of sexual orientation); *Doe v. City of Belleville*, 119 F.3d 563, 582–83 (7th Cir. 1997) (finding "nothing wrong with [the] theory" that harassment can be classified as gender-based when supported by evidence that one's co-workers believe "that an earring is a feminine accouterment not suitable for male adornment").

¹⁴⁴ See *supra* notes 95–105 and accompanying text.

¹⁴⁵ See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

¹⁴⁶ See Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 976 (2005) ("Systemic disparate treatment claims can focus on the total results of an employer's hiring practices and sometimes infer discriminatory purpose from 'bad stats . . .'").

¹⁴⁷ *Teamsters*, 431 U.S. at 336.

¹⁴⁸ Cf. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 469 (2001) ("[B]ehavior that appears gender neutral,

lower wages to invidious height discrimination when considered in isolation, he might have greater success by showing that all short men working for the employer receive lower wages than their similarly qualified, taller counterparts.

The EEOC typically brings systemic disparate treatment cases, but private plaintiffs may bring the functional equivalent of such cases in the form of Rule 23 class actions.¹⁴⁹ Although these actions typically are not well-suited to address uniquely individualized forms of discrimination, such as disability discrimination under the ADA,¹⁵⁰ plaintiffs have successfully brought systemic disparate treatment actions challenging sexual harassment¹⁵¹ and gender stereotyping under Title VII.¹⁵² In *Dukes v. Wal-Mart Stores, Inc.*,¹⁵³ for example, the class alleged that Wal-Mart discriminated against female employees by delegating unfettered decision-making authority to lower-level supervisors and managers, which resulted in lower wages and fewer or slower promotions for female workers.¹⁵⁴ To support their claim, the *Dukes* plaintiffs presented evidence, both anecdotal and expert, that Wal-Mart corporate culture placed a strong emphasis on building and maintaining a uniform culture and fostered an environment that perpetuated gender stereotyping.¹⁵⁵ Similar class lawsuits have challenged the delegation of unfettered decision-making authority that promotes stereotypes and, in turn, limits opportunities for women or minorities.¹⁵⁶

Although a systemic theory of liability (either disparate impact or systemic disparate treatment) seems best suited for height-based claims, plaintiffs proceeding under a systemic disparate treatment theory are more likely to succeed if they can supplement their statistical evidence with direct evidence of

when considered in isolation, may actually produce gender bias when connected to broader exclusionary patterns.”).

¹⁴⁹ See MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 214 (6th ed. 2003); see also FED. R. CIV. P. 23.

¹⁵⁰ See *Sutton v. United Air Lines*, 527 U.S. 471, 480 (1999) (observing that “the determination of whether an individual is [disabled] must be made on a case by case basis”); see also Michael A. Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 864 (2006) (noting that “the class action device, which historically played a central role in group-based discrimination theory (while often going hand in hand with robust disparate impact litigation), has been virtually nonexistent under the [ADA’s] employment provisions”).

¹⁵¹ See generally *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 946 (N.D. Ill. 2001) (listing cases in which the courts recognized “the ability of plaintiffs, including the EEOC, to proceed on a pattern-or-practice theory in litigating claims of systemic employment discrimination, including sexual harassment”).

¹⁵² See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 141, 152–53.

¹⁵⁵ *Id.* at 151, 153–54.

¹⁵⁶ See, e.g., *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 632–34 (N.D. Cal. 2007); *Butler v. Home Depot, Inc.*, Civ. A. No. 94-4335, 1996 U.S. Dist. LEXIS 3370, at *1, *4-5 (N.D. Cal. Mar. 25, 1996); see also Melissa Hart, *Learning from Wal-Mart*, 10 EMP. RTS. & EMP. POL’Y J. 355, 372 (2006).

discrimination.¹⁵⁷ Courts are generally reluctant to infer discrimination from mere statistics without anecdotal evidence of discriminatory motive.¹⁵⁸

IV. HEIGHT DISCRIMINATION AND THE AMERICANS WITH DISABILITIES ACT

Height-based discrimination claims may also prove viable under the Americans with Disabilities Act of 1990 (“ADA”).¹⁵⁹ The ADA generally prohibits discrimination “because of” one’s disability.¹⁶⁰ Just like Title VII plaintiffs, an ADA plaintiff must first make out a prima facie case under either a disparate treatment theory or a disparate impact theory.¹⁶¹ Under either theory, however, the first and typically fatal hurdle has been establishing one’s “disability.”¹⁶²

The ADA defines disability, in part, as “a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual” or

¹⁵⁷ Cf. Miller, *supra* note 9, at 264–65 (“[W]here available, statistics may demonstrate the discriminatory effect of a company’s hiring, assignment and promotion policies on minorities. . . . The low percentage of little people in the labor market makes it extremely difficult to obtain any meaningful statistical evidence about little people. Since no meaningful percentage of little people are concentrated in any particular labor area, researchers must examine a diverse group of industries to describe hiring and promotion practices affecting dwarfs.”).

¹⁵⁸ See Tracy A. Baron, Comment, *Keeping Women Out of the Executive Suite: The Courts’ Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 288 (1994) (“In systemic disparate treatment cases, courts often refuse to infer discrimination solely from a pattern of exclusion demonstrated by statistics, and instead insist on anecdotal evidence of discriminatory motive.”).

¹⁵⁹ 42 U.S.C. §§ 12101–12300 (2006). Additionally, the Rehabilitation Act of 1973 applies the same standards to discrimination in any program or activity that receives federal assistance. See 29 U.S.C. § 794 (2006); see also *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193 (2002) (“Congress drew the ADA’s definition of disability almost verbatim from the definition of ‘handicapped individual’ in the Rehabilitation Act.”). Compare 29 U.S.C. § 705(20) (2006) (defining “individual with a disability” under the Rehabilitation Act) with 42 U.S.C. § 12102(1) (2006) (defining “disability” with respect to an individual under the ADA).

¹⁶⁰ See 42 U.S.C. § 12112(a) (2006) (prohibiting disability discrimination in the workplace); *id.* § 12132 (prohibiting discrimination in the enjoyment of public services, programs, or activities); *id.* § 12182 (prohibiting same in the enjoyment of public accommodations).

¹⁶¹ See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 n.3 (2003) (observing that the courts of appeals have applied the *McDonnell Douglas* framework in ADA cases); *id.* at 53 (recognizing that “[b]oth disparate-treatment and disparate-impact claims are cognizable under the ADA”).

¹⁶² See Sullivan, *supra* note 146, at 942 & n.123 (discussing a 2003 study that found only 2 percent of ADA cases were won by employee plaintiffs and that barely half made it to consideration on their merits); see generally ADA Amendments Act of 2008, Pub. L. No. 110-325 §§ 2(a), (b), 122 Stat. 3553, 3554 (2008) [hereinafter “ADAAA”] (expressing dismay that Supreme Court decisions construed the ADA too narrowly thereby eliminating protection for many individuals whom Congress intended to protect).

“being regarded as having such an impairment.”¹⁶³ This section examines how short stature fits (or does not fit) within each of these definitions. The first part looks at height-based claims under an “actual impairment” theory. Although most courts have wholly rejected “actual impairment” claims premised on short stature, a fresh look at the regulatory scheme in light of the ADA Amendments Act of 2008 (“ADAAA”) suggests that such claims may have merit after all. The second part considers height-based claims under the “regarded as” prong. Although “regarded as” claims premised on height have largely failed, such claims may prove increasingly viable after the enactment of the ADAAA.

A. “Actual Impairment”

1. Statutory and Regulatory Framework

To be protected under the ADA’s “actual impairment” prong, a plaintiff must establish (1) that he or she suffers from a physical or mental impairment (2) that substantially limits a major life activity.¹⁶⁴ The Supreme Court summarily observed in *Sutton v. United Air Lines, Inc.*,¹⁶⁵ that “an employer is free [under the ADA] to decide that physical characteristics . . . that do not rise to the level of an impairment—such as a one’s height, build, or singing voice—are preferable to others.”¹⁶⁶ But what actually constitutes a physical impairment? The EEOC has promulgated regulations interpreting the ADA’s statutory language, defining physical impairment as “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine”¹⁶⁷

The EEOC has further clarified that “‘impairment’ does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within ‘normal’ range and are not the result of a physiological disorder.”¹⁶⁸ A plain reading of this language would suggest that the definition of “physical impairment” includes either (1) a normal deviation in height that is the product of a physiological disorder, or (2) an extreme deviation in height that may or may not be caused by a physiological disorder.¹⁶⁹

¹⁶³ 42 U.S.C. §§ 12102(2)(A), (C) (2006). The ADA also defines disability in a third way, i.e., if a person has a record of impairment. *Id.* § 12102(2)(B). This definition of disability, however, adds little to the discussion of height under the ADA and is therefore omitted.

¹⁶⁴ See 42 U.S.C. § 12102(2)(A) (2006).

¹⁶⁵ 527 U.S. 471 (1999).

¹⁶⁶ *Id.* at 490 (emphasis added).

¹⁶⁷ 29 C.F.R. § 1630.2(h)(1) (2008).

¹⁶⁸ 29 C.F.R. pt. 1630, App. § 1630.2(h) (2008) (emphasis added).

¹⁶⁹ See EEOC Interpretive Manual, *supra* note 91, § 902.2(c)(5) (“[N]ormal deviations in height, weight, or strength that are not the result of a physiological disorder

Many federal courts have not read the regulations this expansively, finding that short stature does not constitute an impairment and, thus, is not protected under the ADA. As this part demonstrates, however, these courts have too narrowly construed the statute and regulations, particularly in light of the ADAAA's renewed commitment to expanding protections against disability discrimination. Extreme deviations in height may qualify as impairments and, in some cases, rise to the level of disability even in the absence of an underlying physiological disorder.

2. *Extreme Short Stature Constitutes an Impairment*

(a) *"Just Plain Short"*

As noted above, a plain reading of the EEOC's interpretive guidance suggests that height can qualify as an impairment in one of two ways: (1) if a physiological disorder causes a normal deviation in height; or (2) if one suffers from an extreme deviation in height (i.e., outside the "normal range"), whether or not it is the result of a physiological disorder.¹⁷⁰ This section focuses on the second possible reading because most cases of short stature are not the result of a physiological disorder.

Short stature has myriad causes. Some causes are environmental, such as trauma, radiation, and malnutrition.¹⁷¹ Some causes are medical, including growth hormone deficiency (e.g., hypopituitary dwarfism),¹⁷² congenital diseases (e.g., Turner syndrome),¹⁷³ illness (e.g., chronic renal insufficiency),¹⁷⁴ and skeletal dysplasias (e.g., achondroplasia and diastrophic dysplasia).¹⁷⁵ However, medical causes account for only about 5 percent of short stature cases,¹⁷⁶ which is to say that most short people suffer from no biological malfunction at all.¹⁷⁷

are not impairments. . . . At extremes, however, such deviations may constitute impairments." (internal citations omitted)).

¹⁷⁰ See *supra* notes 168–169 and accompanying text.

¹⁷¹ See Fox, *supra* note 24, at 1144.

¹⁷² See *id.* at 1144 & n.43; Mary Lee Vance & Nelly Mauras, *Growth Hormone Therapy in Adults and Children*, 341 NEW ENG. J. MED. 1206, 1211 (1999); BETTY M. ADELSON, *DWARFISM: MEDICAL AND PSYCHOSOCIAL ASPECTS OF PROFOUND SHORT STATURE* 28–31 (2005).

¹⁷³ See Vance & Mauras, *supra* note 172, at 1211; Fox, *supra* note 24, at 1144.

¹⁷⁴ See Vance & Mauras, *supra* note 172, at 1211–12; Fox, *supra* note 24, at 1144.

¹⁷⁵ See Vance & Mauras, *supra* note 172, at 1213; ADELSON, *supra* note 172, at 17–18.

¹⁷⁶ See Fox, *supra* note 24, at 1144 (citing Raymond L. Hintz, *Disorders of Growth*, in HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 128 (Kurt J. Isselbacher et al. eds., 1994)).

¹⁷⁷ See *id.* (citing Larry R. Churchill, *Bias, Opportunity, and Justice in Growth Hormone Therapy*, in GROWTH, STATURE, AND ADAPTATION: BEHAVIORAL, SOCIAL, AND COGNITIVE ASPECTS OF GROWTH DELAY 195, 195 (Brian Stabler & Louis E. Underwood eds., 1994)); see also MARTEL & BILLER, *supra* note 2, at 1 ("More than half of very short individuals have no apparent endocrinological or biological abnormality.").

The remaining short people comprise a “heterogeneous group of otherwise apparently normal [people] who are at or below the 5th percentile for height” but who respond normally to growth hormone.¹⁷⁸ This group includes those classified as having genetic short stature, normal-variant familial short stature (if they have short parents), constitutional delay of growth (if they experience a delay in skeletal maturation), or idiopathic short stature (in the absence of any other diagnosable cause).¹⁷⁹ Courts have already recognized that short stature resulting from a variety of the aforementioned medical causes, notably achondroplasia and diastrophic dysplasia, qualifies as an impairment.¹⁸⁰ Those who are just plain short, however, have had virtually no success bringing pure height-based claims under the “actual impairment” prong.

In *Mehr v. Starwood Hotels & Resorts Worldwide, Inc.*,¹⁸¹ for example, the 4’10” female plaintiff filed EEOC charges alleging, inter alia, discrimination for “being short.”¹⁸² She later recharacterized her action as an ADA claim, asserting short stature as an impairment.¹⁸³ The Sixth Circuit denied her claim as meritless because it interpreted the regulations as excluding from the definition of “impairment” all “physical characteristics that are ‘not the result of a physiological disorder.’”¹⁸⁴

¹⁷⁸ Vance & Mauras, *supra* note 172, at 1212.

¹⁷⁹ *Id.* Idiopathic short stature is, in effect, a diagnosis of exclusion because it merely rules out all other systemic, genetic, syndromic, organic, or psychosocial causes. See Mary M. Lee, *Idiopathic Short Stature*, 354 NEW ENG. J. MED. 2576, 2576 (2006).

¹⁸⁰ See *Roloff v. SAP Am., Inc.*, 432 F. Supp. 2d 1111, 1114 (D. Or. 2006) (“It is undisputed that plaintiff, who has ‘dyostrophic dwarfism,’ is disabled.”); *Dexler v. Tisch*, 660 F. Supp. 1418, 1425 (D. Conn. 1987) (finding man who suffered from achondroplastic dwarfism qualified for protection under the Rehabilitation Act). The plaintiff in *Roloff*, despite losing on the defendant’s motion for summary judgment, currently stars in TLC’s reality show “Little People Big World.” See TLC.com, Meet Matt Roloff, <http://tlc.discovery.com/fansites/lpbw/bios/matt.html> (last accessed December 2, 2008).

¹⁸¹ 72 F. App’x. 276 (6th Cir. 2003).

¹⁸² *Id.* at 286.

¹⁸³ *Id.* at 287.

¹⁸⁴ *Id.* (quoting *Andrews v. Ohio*, 104 F.3d 803, 808 (6th Cir. 1997)). *Andrews* involved claims that obesity and lack of cardiovascular endurance qualified as impairments. *Andrews*, 104 F.3d at 805–06. The Sixth Circuit rejected the claims, perfunctorily reading 29 C.F.R. § 1630.2(h) to exclude from the definition of impairment all physical characteristics not resulting from physiological disorders. See *id.* at 808. The court justified that “[t]o hold otherwise would . . . distort the ‘concept of an impairment [which] implies a characteristic that is not commonplace’ and would thereby ‘debase [the] high purpose [of] the statutory protections available to those truly handicapped.’” *Id.* at 810 (emphasis added).

The *Andrews* court, however, did not consider the “normal range” reading of the regulation discussed above, instead relying on its prior holding in *Jasany v. United States Postal Service*, 755 F.2d 1244, 1250 (6th Cir. 1985), which determined that “[c]haracteristics such as average height or strength that render an individual incapable of performing particular jobs are not covered by the statute because they are not impairments” under the Rehabilitation Act. *Andrews*, 104 F.3d at 810 (quoting *Jasany*,

Similarly, in *Gowins v. Greiner*,¹⁸⁵ the plaintiff was a 6'5", wheelchair-confined inmate who sued under the ADA and the Rehabilitation Act because he was not provided with a bed that suitably accommodated his height and disability.¹⁸⁶ The plaintiff conceded that the inadequacy of the bed derived primarily from his height, which caused his feet to dangle over the edge of the bed.¹⁸⁷ The district court rejected his ADA claim, declaring that "a person's height is not ordinarily an 'impairment' covered as a disability by the Rehabilitation Act or the ADA" and finding that physical characteristics, such as height, that are not the result of a physiological disorder do not qualify as impairments.¹⁸⁸

Why have these claims failed? In part, it may be because many of them, including *Mehr* and *Gowins*, have been litigated by pro se plaintiffs.¹⁸⁹ More likely, it is because the courts considering such claims have considered only one possible reading of the regulation. Despite the regulation's plain language, and notwithstanding the EEOC's recognition that "[a]t extremes . . . deviations [in height] may constitute impairments,"¹⁹⁰ federal courts have not considered this theory in deciding height-based claims under the ADA.¹⁹¹

(b) "Within 'Normal Range'"

Even if federal courts had applied an "extreme deviation in height" gloss to the regulation, they would have been left without much guidance on just how extreme a deviation in height must be to qualify as an impairment—this in spite of the EEOC's efforts to provide such guidance. To clarify what constitutes an extreme deviation in height, the EEOC Interpretive Manual offers two examples. The first example, which the EEOC suggests does *not* qualify under the ADA, involves a 4'10" woman¹⁹² denied a job as a factory worker because the employer

755 F.2d at 1249 (emphasis added)). Nevertheless, *Jasany* adopted this standard out of whole cloth. See *Jasany*, 755 F.2d at 1249 & n.4. Thus, *Mehr* serves as a good example of how courts have perpetuated incomplete (and therefore improper) standards for considering height as a qualifying impairment; other courts have relied on *Andrews* to dismiss height-based disability claims. See *infra* note 188 and accompanying text.

¹⁸⁵ Civ. A. No. 01-6933, 2002 U.S. Dist. LEXIS 14098, at *1 (S.D.N.Y. July 31, 2002).

¹⁸⁶ *Id.* at *4–5, *31.

¹⁸⁷ *Id.* at *31.

¹⁸⁸ *Id.* at *32 (quoting *Andrews v. Ohio*, 104 F.3d 803, 808 (6th Cir. 1997)).

¹⁸⁹ The plaintiffs in *Reiterman v. Costco Wholesale Management # 238*, Civ. A. No. 05-12, 2005 U.S. Dist. LEXIS 15219, *1 (W.D. Va. July 28, 2005), and *Mullett v. American Cargo, Inc.*, Civ. A. No. 03-608, 2005 U.S. Dist. LEXIS 24245, *1 (N.D. Ind. Oct. 19, 2005), likewise proceeded pro se and lost. See *infra* notes 245–249 and accompanying text.

¹⁹⁰ EEOC Interpretive Manual, *supra* note 91, § 902.2(c)(5).

¹⁹¹ See *supra* note 184.

¹⁹² A height of 4'10" puts a woman below the third percentile for height. See *supra* Table 4; see also Fox, *supra* note 24, at 1143 (noting that "[a] short-statured adult female may be as tall as 4 feet 11.1 inches . . .").

thought her too small to do the job.¹⁹³ Despite her below-average height, the EEOC says that “her small stature [is] not so extreme as to constitute an impairment”¹⁹⁴ The second example, which the EEOC finds *does* qualify under the ADA, involves a 4’5” man suffering from achondroplastic dwarfism.¹⁹⁵ Unfortunately, neither of these examples actually clarifies what falls outside “normal range.”

(i) *Why the EEOC’s Interpretive Examples Provide No Guidance*

The second of the EEOC’s examples is entirely inapposite to cases that do not involve medically-caused short stature because the plaintiff in that example clearly suffers from an underlying physiological disorder.¹⁹⁶ Thus, the plaintiff in the example would qualify for protection even under the more limited reading of the regulation that many courts have applied to height-based cases. The first example, moreover, although superficially helpful, is deficient for two reasons: (1) it speaks in terms of nominal height rather than relative height (i.e., in inches, not percentiles), which is most appropriate when discussing the “normal range”; and (2) it is based substantially on *American Motors Corp. v. Labor & Industry Review Commission*,¹⁹⁷ which, for several reasons discussed below, cannot inform impairment determinations under the ADA.

In *American Motors*, the Supreme Court of Wisconsin considered under the state’s Fair Employment Act the discrimination claims of a 4’10”-tall woman who had been denied a job as a factory worker allegedly because of her short stature.¹⁹⁸ Under the Wisconsin law, the plaintiff had to first establish that she was “handicapped within the meaning of the Act.”¹⁹⁹ The statute at that time, however, did not define “handicap.”²⁰⁰ Rather, the Wisconsin courts had defined “handicap” by its common usage to include “such diseases . . . which make achievement unusually difficult”²⁰¹ or which “limit[] the capacity to work.”²⁰²

Relying on this definition of “handicap,” the *American Motors* court held that “a handicap within the meaning of the Act is a physical or mental condition that

¹⁹³ See EEOC Interpretive Manual, *supra* note 91, § 902.2(c)(5)(i).

¹⁹⁴ *Id.* (citing *Am. Motors Corp. v. Wisc. Labor & Indus. Review Comm’n*, 350 N.W.2d 120 (Wis. 1984)).

¹⁹⁵ *Id.* § 902.2(c)(5)(1) (citing *Dexler v. Tisch*, 660 F. Supp. 1418, 1425 (D. Conn. 1987)).

¹⁹⁶ See *supra* note 175 and accompanying text.

¹⁹⁷ 350 N.W.2d 120 (Wis. 1984).

¹⁹⁸ *Id.* at 121.

¹⁹⁹ *Id.* at 122.

²⁰⁰ *Id.* at 122–23. Wisconsin has since redubbed “handicap” as “impairment” and codified the definition. See WIS. STAT. ANN. § 111.32(8)(a) (West 2002).

²⁰¹ *Am. Motors*, 350 N.W.2d at 122–23 (quoting *Chi., Milwaukee, St. Paul & Pac. R.R. Co. v. Wis. Dep’t Indus. Labor & Human Relations*, 215 N.W.2d 443, 446 (Wis. 1974)).

²⁰² *Id.* at 123 (discussing *Dairy Equip. Co. v. Dep’t Indus. & Human Relations*, 290 N.W.2d 330 (Wis. 1980)).

imposes limitations on a person's ability to achieve and capacity to work beyond the normal limitations that might render a person unable to make certain achievements or perform every possible job."²⁰³ Although the court determined that "[a]ll persons have some mental or physical deviations from the norm," the court rightly held that "such inherent limitations or deviations . . . do not automatically constitute handicaps."²⁰⁴ The court concluded, however, that the plaintiff's height "[did] not constitute such a significant deviation from the norm that it [made] achievement *unusually* difficult" because—although the plaintiff was below the norm for height and faced "some limitations on her general ability to achieve and work, a person with her stature [remained] capable of a wide range of achievements, including many that a taller and heavier person could not do."²⁰⁵

The EEOC's continued reliance on *American Motors* for guidance is problematic for several reasons. First, the decision deals exclusively with Wisconsin state law. Moreover, the case was decided over a decade after the enactment of the Rehabilitation Act of 1973, which internally defined "disability," as does the ADA, as "a physical or mental impairment that substantially limits one or more major life activities."²⁰⁶ Thus, it is significant that Wisconsin's Fair Employment Act defined handicap and impairment differently from then-existing federal law because it suggests that the Wisconsin law was meant to apply independently of the federal law and its definitions.²⁰⁷

Second, the *American Motors* court never discretely considered whether the plaintiff's height was itself an impairment.²⁰⁸ Rather, the court approached the inquiry such that, in effect, it conflated the factual determination of whether the plaintiff was impaired with the legal determination of whether she was "handicapped" (and thus eligible for protection under the Act). The Wisconsin

²⁰³ *Id.*

²⁰⁴ *Id.* at 124.

²⁰⁵ *Id.*

²⁰⁶ See 29 U.S.C. § 705(9)(B) (2006).

²⁰⁷ See *Am. Motors*, 350 N.W.2d at 122 n.3 (observing that the subsequent amendments to the Wisconsin law incorporated the definition of handicap contained in the federal Rehabilitation Act, but that "[b]ecause there [was] no indication that the legislature intended a retroactive application of this statute, the provisions of the Act in effect at the time Basile filed her amended complaint apply in [the] case"); cf. *King v. City of Madison*, Civ. A. No. 07-295, 2008 U.S. Dist. LEXIS 25793, at *2-3 (W.D. Wis. Mar. 28, 2008) ("Unfortunately for plaintiff, a state administrative law judge's determination under [Wisconsin's Fair Employment Act] has no bearing on a federal court's determination of disability under federal law."); Jane M. Nold, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act*, 1983 WIS. L. REV. 725, 732-35 (describing the differences between the Wisconsin FEA and the Rehabilitation Act).

²⁰⁸ See *Miller*, *supra* note 9, at 247 (observing that the plaintiff's lawyers "stressed her ability to perform the job's tasks, down-playing any evidence of physical impairment," a strategy that "excluded arguments which addressed the classification of stature as a handicap").

courts now bifurcate this analysis to parallel the ADA analysis, considering first whether a person has an impairment and then determining whether that impairment makes “achievement unusually difficult or limits the capacity to work.”²⁰⁹

Finally, *American Motors* relied on the Fair Employment Act’s definition of disability—limited in its application exclusively to the employment context—which rendered impairments protected only if they “impose[d] limitations on a person’s ability to achieve and *capacity to work* beyond the normal limitations that might render a person unable to make certain achievements *or perform every possible job*.”²¹⁰ The ADA, however, considers whether an impairment “substantially limits one or more . . . major life activities,”²¹¹ which encompasses far more than just working.²¹² After all, the ADA extends well beyond the employment context.²¹³ Thus, the determination by the *American Motors* court that the plaintiff was not disabled because she could still work would not presently preclude a finding that a 4’10”-tall woman is “disabled” under the ADA if her impairment substantially limited a life activity other than working. The ADA has since codified a non-exhaustive list of such life activities.²¹⁴

In sum, although the EEOC has tried to clarify what constitutes outside the “normal range” for height, its purported guidance provides little guidance at all. In the absence of such agency insight, the question remains how to determine when a person’s short stature is sufficiently extreme to qualify as an impairment under the federal statute.

(ii) *What Should Be Considered “Within Normal Range”*

To determine what is within normal range for height, one might look for guidance to similar regulations governing weight. However, the weight-based regulations prove largely unhelpful for a variety of reasons, most notably that few if any pure weight-based discrimination claims are brought under the ADA.²¹⁵ Rather, overweight ADA plaintiffs typically allege discrimination on the basis of

²⁰⁹ See, e.g., *Hutchinson Tech., Inc. v. Labor & Indus. Review Comm’n*, 682 N.W.2d 343, 346–37 n.4 (Wis. 2004) (quoting WIS. STAT. ANN. § 111.32(8)).

²¹⁰ *Am. Motors*, 350 N.W.2d at 124 (emphasis added).

²¹¹ 42 U.S.C. § 12102(2)(A) (2006).

²¹² See 29 C.F.R. § 1630.2(i) (2008) (defining “major life activities” to include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working”); see also ADA, Pub. L. No. 110-325 § 3(2), 122 Stat. 3553, 3555 (2008) (codifying a non-exhaustive list of “major life activities”).

²¹³ The ADA also applies to public services, see 42 U.S.C. §§ 12131–12165 (2006), and public accommodations. See *id.* §§ 12181–12189 (2006).

²¹⁴ See ADA, Pub. L. No. 110-325 § 3(2), 122 Stat. 3553, 3555 (2008) (codifying a non-exhaustive list of “major life activities”).

²¹⁵ But pure weight requirements have been challenged under Title VII for their disparate impact on certain groups, such as women. See generally EEOC Interpretive Manual, *supra* note 91, §§ 621.4–621.5 (discussing how weight requirements give rise to disparate impact and disparate treatment claims under Title VII).

their *obesity*.²¹⁶ To qualify as an impairment, a person's weight must actually constitute "severe" or "morbid" obesity, i.e., it must be 100 percent over that person's medically ideal weight.²¹⁷ This measurement, however, is relative to a nominal value (normal height for one's ideal weight), without reference to the frequency with which that value occurs in the population. And what constitutes normal or abnormal weight depends on not just how heavy one is, but how heavy one is compared with how tall one is.²¹⁸ To put it simply, there theoretically could be an unlimited number of obese people if everyone weighed twice as much as he or she should,²¹⁹ while there could never be an unlimited number of short people because some will always be taller or shorter than others.²²⁰ Thus, because mere weight as a characteristic is not protected under the ADA, and because obesity is not truly examined for statistical "normalcy" within the population, the definition of obesity does little to inform the determination of "normal range" for height.

The most logical remaining option for determining "normal range" would be to look to statistical principles, namely standard deviation.²²¹ Standard deviation, as a "descriptive statistic,"²²² measures "the typical or expected variation of the

²¹⁶ See, e.g., *Cook v. R.I. Dep't. Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 20 (1st Cir. 1993); see also *Greenberg v. BellSouth Telecomms., Inc.*, 498 F.3d 1258, 1260 (11th Cir. 2007) (per curiam); *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 438 (6th Cir. 2006); *Francis v. City of Meriden*, 129 F.3d 281, 284 (2d Cir. 1997); *Fredregill v. Nationwide Agribusiness Ins. Co.*, 992 F. Supp. 1082, 1084 (S.D. Iowa 1997); *Walton v. Mental Health Ass'n of Se. Pa.*, Civ. A. No. 96-5682, 1997 U.S. Dist. LEXIS 18224, at *44 (E.D. Pa. Nov. 18, 1997); *EEOC v. Texas Bus Lines*, 923 F. Supp. 965, 971 (S.D. Tex. 1996); cf. *Torcasio v. Murray*, 57 F.3d 1340, 1353 (4th Cir. 1995) (arguing that the ADA applies to prison inmates); see generally *Korn, supra* note 7, at 25 (exploring obesity as disability under the ADA).

²¹⁷ EEOC Interpretive Manual, *supra* note 91, § 902.2(c)(5)(ii) n.15 ("The term 'obesity' has been defined as '[t]he excessive accumulation of body fat. Except for heavily muscled persons, a body weight 20% over that in standard height-weight tables is arbitrarily considered obesity.'" (quoting THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (Robert Berkow ed., 16th ed. 1992))).

²¹⁸ See CDC.gov, *Overweight and Obesity: Defining Overweight and Obesity*, <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last visited Sept. 1, 2009) ("For adults, overweight and obesity ranges are determined by using weight and height to calculate a number called the 'body mass index' (BMI).").

²¹⁹ This fact is made all the more evident by the dramatic increase in obesity in the United States. For an animated map of the increasing prevalence of obesity from 1985 to 2008, see CDC.gov, *Obesity and Overweight: Trends by State 1985–2008*, <http://www.cdc.gov/obesity/data/trends.html#State> (last visited Sept. 1, 2009).

²²⁰ See Michael H. Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11, 40 n.87 (1991) ("Of course, any population with a variable trait will have upper and lower regions.").

²²¹ See *infra* app. fig.1.

²²² Descriptive statistics—such as averages and medians—"describe certain features of the numbers on which they are based and suppress others." DAVID W. BARNES & JOHN M. CONLEY, *STATISTICAL EVIDENCE IN LITIGATION: METHODOLOGY, PROCEDURE, AND PRACTICE* 126 (1986).

numbers in a group from their average.”²²³ Standard deviation is particularly useful when examining a “normal population” of numbers,²²⁴ like anthropometric data (height, weight, etc.),²²⁵ which resemble bell-shaped curves.²²⁶ Looking at the “range” of a normal population, i.e., from the lowest value to the highest value, 68 percent of all values will fall within one standard deviation of the mean: 34 percent will be within one standard deviation below the mean, and 34 percent will be within one standard deviation above the mean.²²⁷ Roughly 96 percent of all values will fall within two standard deviations from the mean, 48 percent below and 48 percent above.²²⁸ Thus, only 4 percent of the population will fall beyond two standard deviations from the mean—the smallest and largest 2 percent of values relative to the mean.²²⁹

One can use standard deviation to test the degree to which an assumption, called a null hypothesis, is the result of chance.²³⁰ An outcome is not likely to be the result of chance if it falls more than two standard deviations from the mean, because there are only four chances in 100 that the outcome is consistent with the assumption.²³¹ Thus, if the assumption is that a person’s height will be average, anyone whose height falls beyond two standard deviations from the average—that is, anyone among the shortest 2 percent or the tallest 2 percent—is not of average (normal) height. Generally, statisticians reject the null hypothesis when there is less than a 5 percent probability that the outcome is the product of chance.²³² This means that any outcome falling beyond 1.96 standard deviations above or below the mean is excluded.²³³

Applying these principles, the shortest 2.5 percent and the tallest 2.5 percent of the population statistically fall outside “normal range” for height. Based on national anthropometric data collected by the National Center for Health Statistics, men shorter than approximately 5’4” and women shorter than roughly 4’11” would fall outside normal range.²³⁴

A 2.5 percentile benchmark ostensibly comports with other regulatory and scientific benchmarks for abnormal height. For example, the FDA recommends treating idiopathic short stature in children only in cases where the child’s growth rate is unlikely to produce an adult height within normal range, which the FDA

²²³ *Id.* at 129.

²²⁴ *Id.* at 140.

²²⁵ *See infra* app. tbls.1–4.

²²⁶ BARNES & CONLEY, *supra* note 222, at 140.

²²⁷ ZIMMER, *supra* note 149, at 242.

²²⁸ *See id.*

²²⁹ *Id.*; *see also infra* app. fig.1.

²³⁰ *See* ZIMMER, *supra* note 149, at 237.

²³¹ *Id.* at 243.

²³² *Id.*

²³³ *Id.*

²³⁴ This is yet another reason why the EEOC’s interpretive example, based on the facts of *American Motors*, proves unhelpful. In *American Motors*, the plaintiff was a 4’10” female. *See supra* notes 193–194 and accompanying text.

projects to be sixty-three inches for men and fifty-nine inches for women.²³⁵ Both the American Academy of Pediatrics and American Association of Clinical Endocrinologists define short stature in a similar manner.²³⁶ They state that short stature is “height that falls more than two standard deviations . . . below the national mean for age and sex.”²³⁷ In the context of disability benefits provided under the Social Security Act, persistent height below the third percentile that is also “related to an additional specific medically determinable impairment” qualifies as a compensable disability in children.²³⁸ Short adults, however, do not qualify for Social Security benefits,²³⁹ although the qualifying standards for “disability” under the Social Security Administration tend to be more rigorous than those for protection under the ADA.²⁴⁰

Nevertheless, the 2.5 percentile is frustratingly subjective. Although some doctors consider height below even the fifth percentile to be outside normal range,²⁴¹ many readily admit that any measure is “totally arbitrary.”²⁴² For

²³⁵ FDA Talk Paper, T03-56, *FDA Approves Humatrope for Short Stature* (July 25, 2003), available at <http://www.scienceblog.com/community/older/archives/M/1/fda0850.htm>; see also Lee, *supra* note 179, at 2578 & Table 1.

²³⁶ See Fox, *supra* note 24, at 1143.

²³⁷ See *id.*

²³⁸ 20 C.F.R. § 404, Subpt. P., App.1, 100.02 (2008); see also *Horn v. Callahan*, No. 96-5257, 1997 U.S. App. LEXIS 28599, at *4-5 (10th Cir. Sept. 26, 1997) (finding that achondroplastic dwarfism—a hereditary condition that retards bone growth—cannot be the “additional specific medically determinable impairment” to which a claimant’s growth impairment must be “related” under § 100.02); *Verret v. Comm’r of Soc. Sec.*, Civ. A. No. 99-3647, 2001 U.S. Dist. LEXIS 2217, at *16-18 (E.D. La. Feb. 21, 2001) (finding no qualifying growth impairment, despite persistence of height below third percentile, absent evidence that established its relation to another impairment).

²³⁹ The Social Security Administration determines eligibility for disability benefits on the basis of regulations that describe “various physical and mental illnesses and abnormalities, most of which are categorized by the body system they affect.” *Sullivan v. Zebley*, S.S.R. No. 91-7c (Cum. Ed. 1991), 1991 SSR LEXIS 7, at *12 (Aug. 1, 1991) (citing 20 C.F.R. pt. 404, subpt. P, App. I (pt. A)). In addition to those categorized body systems—“musculoskeletal, special senses and speech, respiratory, cardiovascular, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine”—there are four additional groups of listings not categorized by body system, which include multiple body system impairments, neurological impairments, mental disorders, and malignant neoplastic diseases. See *Sullivan v. Zebley*, 493 U.S. 521, 530 n.6 (1990). For children, however, the regulations add a category for “growth impairment.” *Id.*

²⁴⁰ *Cf. Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 797-98 (1999) (observing that “[t]he Social Security Disability Insurance (SSDI) program provides benefits to a person with a disability so severe that she is ‘unable to do [her] previous work’ and ‘cannot . . . engage in any other kind of substantial gainful work which exists in the national economy[.]’” whereas the ADA considers merely whether “‘with reasonable accommodation’ she could ‘perform the essential functions’ of her job” (citing 42 U.S.C. §§ 1382c(a)(3), 12111(8)).

²⁴¹ See HALL, *supra* note 5, at 303; Sandberg & Colman, *supra* note 12, at 18.

example, some researchers suggest that a boy who is just one standard deviation below the average height for his age remains at risk for “psychological difficulties.”²⁴³ Ultimately, the problems associated with short stature may not boil down to height at all but rather a person’s “ability to cope with the stresses of being short.”²⁴⁴

3. “Substantially Limits a Major Life Activity”

The second hurdle to establishing a viable “actual impairment” claim involves showing how one’s impairment substantially limits a major life activity. Several courts have dismissed height-based claims, before the ADAAA, because the plaintiff failed to establish this element. For example, in *Reiterman v. Costco Wholesale Management # 238*,²⁴⁵ the 4’8” female plaintiff claimed that she was disabled because her short stature made it difficult to reach her cash register and that constant reaching caused her tendinitis.²⁴⁶ The court rejected her ADA claim, perfunctorily finding that her height was not a “disability” within the meaning of the ADA “because it [did] not ‘substantially limit’ her ability to engage in the major life activity of working.”²⁴⁷ Likewise, in *Mullet v. American Cargo, Inc.*,²⁴⁸ the district court determined that the plaintiff could not proceed under an “actual impairment” theory because he could not identify any major life activity that his height kept him from performing.²⁴⁹

The ADAAA now codifies in the statute a non-exhaustive list of qualifying life activities, which includes “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”²⁵⁰ The ADAAA further clarifies that a qualifying impairment need only substantially limit *one* such activity in order to render someone “disabled.”²⁵¹ Concededly, being just plain short in most cases does not substantially limit one’s ability to engage in any

²⁴² HALL, *supra* note 5, at 303; *see also* Sharon E. Oberfield, *Growth Hormone Use in Normal, Short Children—A Plea for Reason*, 340 NEW ENG. J. MED. 557, 557–59 (1999) (suggesting that there is no good definition of “short stature”); *cf.* ADELSON, *supra* note 172, at 3 (stating that for dwarfism “any cutoff must be somewhat arbitrary”).

²⁴³ MARTEL & BILLER, *supra* note 2, at 99.

²⁴⁴ HALL, *supra* note 5, at 303.

²⁴⁵ Civ. A. No. 05-12, 2005 U.S. Dist. LEXIS 15219, *1 (W.D. Va. July 28, 2005).

²⁴⁶ *Id.* at *3–4.

²⁴⁷ *Id.* at *8.

²⁴⁸ Civ. A. No. 03-608, 2005 U.S. Dist. LEXIS 24245, *1 (N.D. Ind. Oct. 19, 2005).

²⁴⁹ *Id.* at *8–9.

²⁵⁰ ADAAA, Pub. L. No. 110-325 § 4(a)(2), 122 Stat. 3553, 3555 (2008) (to be codified at 42 U.S.C. § 12102(2)(A)).

²⁵¹ *Id.* § 4(a)(1) (to be codified at 42 U.S.C. § 12102(5)(B)); *see also* Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 N.W. U. L. REV. COLLOQUY 217, 222 (2008) (stating that the amendments clarify that “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability”).

of the aforementioned life activities, at least under the pre-ADAAA definition of “substantially limits” (i.e., “prevents or severely restricts”).²⁵² To argue otherwise would be disingenuous. Nevertheless, there may very well be some whose height falls so far below the 2.5 percentile threshold (e.g., at the 1st percentile) that their short stature does limit a qualifying life activity;²⁵³ but that proportion of people is small. As such, only a very limited group of individuals could likely successfully pursue an “actual impairment” claim applying the pre-ADAAA definition of “substantially limits.”

Yet all may not be lost in the post-ADAAA world. First, the statutory list of qualifying major life activities is non-exhaustive and may be interpreted in the future to include activities that short stature does substantially limit. Second, Congress has directed that the definition of disability be construed broadly²⁵⁴ and that impairments be considered in their unmitigated state—that is, before they are corrected by medication, assistive technology, accommodations, or modifications.²⁵⁵ Third, in keeping with the spirit of the Findings and Purposes sections of the ADAAA, the EEOC may in the future retool its definition of “substantially limits” to be less restrictive than the pre-ADAAA standard.²⁵⁶

Finally, it is important to understand that presently identifying short stature as an impairment may prove necessary to overcoming those pre-ADAAA cases that casually concluded that height can *never* qualify for protection under the ADA.²⁵⁷ This body of law could hinder height-based claims brought, not only under the “actual impairment” prong, but also the “regarded as” prong.²⁵⁸

B. “Regarded As” Impaired

Whatever the merits of characterizing height as a disability, there can be no doubt that we *perceive* extreme short stature as a handicap.²⁵⁹ It may be fair to say

²⁵² See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002) (noting that it was insufficient to “merely submit evidence of a medical diagnosis of an impairment”).

²⁵³ For example, while it is hard to conceive of an otherwise healthy 5’2” man being unable to care for himself, a 4’10” man or a 4’8” woman may find it significantly more difficult to do so.

²⁵⁴ ADAAA, Pub. L. No. 110-325 § 4(a), 122 Stat. 3553, 3555 (to be codified at 42 U.S.C. § 12102(4)(A)).

²⁵⁵ *Id.* § 4(a) (to be codified at 42 U.S.C. § 12102(4)(E)(i)).

²⁵⁶ See Long, *supra* note 251, at 219–220.

²⁵⁷ See *supra* notes 181–191 and accompanying text.

²⁵⁸ See *infra* notes 259–273 and accompanying text.

²⁵⁹ See Oberfield, *supra* note 242, at 558 (“What, then, about the use of growth hormone for short but otherwise normal children whose parents or physicians believe them to be handicapped because of their shortness, or who believe so themselves?”); Colin Krivy, *Men Calming Down About Measuring Up*, THE GLOBE & MAIL, Mar. 8, 1995, at A22 (“But shortness, as much as I hate to admit it, is equated with disability. . . . The assumption was always that my diminutive size made me deficient in some way and therefore I couldn’t possibly be on a par with the lucky tall ones.”).

that discrimination against short people is more the result of stereotypes than any physical limitations imposed by their short stature.²⁶⁰ As noted earlier, we often engage in “gaze behavior”—that is, we subconsciously relegate to a lesser social status those who are shorter than we are because we perceive them as physically inferior.²⁶¹ This perception is most evident in, and perhaps has been amplified by, the debate over the use of HGH to treat normal, short children.²⁶²

Before the ADAAA, however, merely viewing an extremely short person as socially inferior would not have sufficed to render him or her protected. Pre-ADAAA, a person was covered by the “regarded as” prong of the ADA if (1) a covered entity treated a physical or mental impairment as though it substantially limited a major life activity, even though the impairment did not; (2) a covered impairment substantially limited a major life activity only as a result of the attitude of others toward such impairment; or (3) a covered entity treated a person as having an impairment that substantially limited a major life activity even though a person suffered from no such impairment.²⁶³ The first two variations required a plaintiff to establish a qualifying impairment, while all three variations required that an impairment, be it real or perceived, either substantially limit a major life activity or be perceived by the employer to substantially limit such activity.²⁶⁴ Thus, as alluded to above, a pre-ADAAA claim premised on height suffered from two major deficiencies: (1) qualifying short stature as an actual impairment, particularly given the arbitrariness of the 2.5 percentile threshold for impairment;²⁶⁵ and (2) establishing how one’s short stature substantially limited, or was perceived by the employer to substantially limit, a major life activity.²⁶⁶

Under the more permissive ADAAA, however, a person is protected under the “regarded as” prong if an employer merely discriminates against him or her “because of an actual *or perceived* physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity.*”²⁶⁷ As such, the focus under the ADAAA dramatically shifts from the severity of the employer’s

²⁶⁰ Cf. ADELSON, *supra* note 172, at 2–3 (discussing stereotypes related to dwarfism).

²⁶¹ See *supra* notes 11–14 and accompanying text.

²⁶² See *supra* notes 23–29 and accompanying text. Parents of otherwise healthy short children have pushed the medical community to treat their children with HGH because they fear the psychosocially disabling effects of short stature. See ELLIOTT, *supra* note 26, at 241; see also HALL, *supra* note 5, at 247 (noting that “many children who are severely short have nothing obviously wrong with them medically”); Vance & Mauras, *supra* note 172, at 1213 (noting that “[p]arental pressure to correct the perceived ‘deficiency’ of short stature has been responsible in part for the initiation of [growth hormone] treatment” among idiopathically short children).

²⁶³ See 29 C.F.R. 1630.2(h) (2008); see also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489–90 (1999) (discussing disability under the “regarded as” prong).

²⁶⁴ See Long, *supra* note 251, at 223.

²⁶⁵ See *supra* notes 181–191, 241–244 and accompanying text.

²⁶⁶ See *supra* notes 252–253 and accompanying text.

²⁶⁷ ADAAA, Pub. L. No. 110-325 § 4(a), 122 Stat. 3553, 3555 (2008) (to be codified at 42 U.S.C. § 12102(3)(A)) (emphasis added).

misperception about an employee's impairment to merely whether an employee's actual or perceived impairment motivated an adverse employment action.²⁶⁸ However, the amended "regarded as" prong does not apply to impairments that are both "minor" and "transitory" (i.e., those having "an actual or expected duration of 6 months or less").²⁶⁹ Moreover, covered employers "need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual" who is disabled solely under the "regarded as" prong.²⁷⁰

The ADAAA thus resolves the two major deficiencies suffered by "regarded as" claims premised on height. First, it renders unimportant whether a person's height is at or below the 2.5 percentile, so long as the employer regards a person's short stature as an impairment. For example, a person at the 2.6 percentile for height—who would not otherwise suffer from a qualifying impairment²⁷¹—could still bring a "regarded as" claim if the employer unfairly perceived him or her as incapable because of his or her short stature. Second, it does away with the need to establish a causal nexus between one's short stature and substantial limits on a major life activity. Finally, although the ADAAA removes the employer's obligation to provide reasonable accommodations from the quiver of remedies available to "regarded as" plaintiffs, height discrimination typically manifests in a failure to hire, a failure to promote, or disparate wages, none of which ostensibly requires accommodations to remedy.

²⁶⁸ See Long, *supra* note 251, at 224.

²⁶⁹ ADAAA, Pub. L. No. 110-325 § 4(a), 122 Stat. 3553, 3555 (2008) (to be codified at 42 U.S.C. § 12102(3)(B)). What constitutes a "minor" impairment, however, is not defined by the ADAAA. See Long, *supra* note 251, at 224. Nevertheless, "minor" and "transitory" are stated in the conjunctive, suggesting an impairment that is either minor or transitory would still qualify for protection under the "regarded as" prong. Compare Executive Office of the President, Statement of Administration Policy (June 24, 2008) ("The bill [H.R. 3195] does exclude impairments that are *both* transitory *and* minor; however, those that are one or the other would be covered. . . . The Administration believes that the bill should exclude from coverage impairments that are *either* transitory *or* minor."), with ADAAA, Pub. L. No. 110-325 § 4(a), 122 Stat. 3553, 3555 (2008) (excluding from the protections of the "regarded as" prong "impairments that are transitory *and* minor") (emphasis added). Thus, even though short stature may be considered a minor impairment, it arguably qualifies under the "regarded as" prong because it is not transitory.

²⁷⁰ ADAAA, Pub. L. No. 110-325 § 6(a)(1)(h), 122 Stat. 3553, 3555 (2008) (to be codified at 42 U.S.C. § 12201); see also Long, *supra* note 251, at 225 (discussing the reasonable accommodations section of the ADAAA).

²⁷¹ See *supra* note 234 and accompanying text.

V. ADDITIONAL PROTECTIONS AGAINST HEIGHT DISCRIMINATION

A. State and Local Laws

1. Common Law Tort

Without the explicit protections of antidiscrimination laws, many victims of height discrimination in the workplace have had to pursue common law tort claims, namely intentional infliction of emotional distress (IIED). However, a plaintiff pursuing an IIED claim because of workplace height discrimination bears a heavy burden: he or she must show that the conduct giving rise to the claim was extreme and outrageous.²⁷² In *Bodnovich v. ABF Freight Systems, Inc.*,²⁷³ for example, the plaintiff was terminated from his job as a manager and sued under Ohio law, alleging that his superiors subjected him to “cruel and derisive treatment . . . because of his short stature.”²⁷⁴ The court rejected his claim for intentional infliction of emotional distress because it found that he had failed to adduce evidence of the requisite extreme and outrageous conduct.²⁷⁵ Likewise, in *Micu v. Warren*,²⁷⁶ the court rejected a claim of intentional infliction of emotional distress brought by a male firefighter applicant who sued the City of Warren for rejecting his application on the basis of his short stature.²⁷⁷

Conversely, in *Chea v. Men’s Wearhouse, Inc.*,²⁷⁸ the Court of Appeals of Washington sustained a verdict in a negligent infliction of emotional distress case returned in favor of an employee who had endured frequent negative (and sometimes violent) comments about his short stature and Asian heritage.²⁷⁹ Similarly, the short female plaintiff in *Edwards v. New Opportunities Inc.*²⁸⁰ survived a motion to dismiss her IIED claim because the court found that her employer’s behavior was extreme and outrageous.²⁸¹ She alleged that “she was referred to as Dopey because of her short stature and accent and that a nine-foot

²⁷² See *infra* notes 273–277 and accompanying text.

²⁷³ No. 93-B-36, 1994 Ohio App. LEXIS 5598 (Ohio Ct. App. Dec. 13, 1994).

²⁷⁴ *Id.* at *1–2.

²⁷⁵ *Id.* at *7; see also *Schlumbrecht v. Fidelity Homestead Ass’n*, Civ. A. No. 03-3001, 2006 U.S. Dist. LEXIS 14487, at *26–32 (E.D. La. Mar. 30, 2006) (finding that the plaintiff had failed to establish as required by Louisiana law).

²⁷⁶ 382 N.W.2d 823 (Mich. Ct. App. 1985).

²⁷⁷ *Id.* at 824–25. However, the Michigan Court of Appeals did find in favor of the plaintiff with respect to his state antidiscrimination law claim. See *id.* at 828; see also *infra* note 288 (discussing *Micu* in the context of Michigan’s antidiscrimination law).

²⁷⁸ 932 P.2d 1261 (Wash. Ct. App. 1997).

²⁷⁹ *Id.* at 1262–63.

²⁸⁰ Civ. A. No. 05-1238, 2007 U.S. Dist. LEXIS 21667, at *1 (D. Conn. Mar. 26, 2007).

²⁸¹ *Id.* at *28.

cutout of Snow White was positioned outside of the building with her nickname attached”²⁸²

In sum, because common law tort claims involving height discrimination are held to a far more rigorous standard than such claims would be held to under federal antidiscrimination laws, state tort laws do not provide much protection in run-of-the-mill cases of workplace height discrimination.

2. State and Local Antidiscrimination Laws

In the absence of a federal law explicitly prohibiting height discrimination, and in light of the inadequacies of state tort law, several state and local governments have endeavored to fill the gaps in protection by promulgating statutory protections against height discrimination. One state, Michigan, affirmatively proscribes discrimination on the basis of height,²⁸³ while another, Massachusetts, has actively considered protecting against height discrimination but has not yet passed such legislation.²⁸⁴ The District of Columbia has taken a more general approach, condemning employment discrimination on the basis of “personal appearance,” which includes “bodily . . . characteristics” such as height.²⁸⁵ And several municipal governments in California—including those in San Francisco and Santa Cruz—have directly taken on height discrimination in the workplace.²⁸⁶

Nevertheless, even in jurisdictions where laws explicitly prohibit height discrimination, few pure height discrimination cases have been brought,²⁸⁷ and

²⁸² *Id.* at *28 n.10.

²⁸³ See Elliot-Larsen Civil Rights Act of 1976, MICH. COMP. LAWS § 37.2202(1)(a) (2009).

²⁸⁴ See generally Courtney N. Kubilis, Note, “Weighting” for Protection in Massachusetts: The Myth of Equal Opportunity in Employment, 42 SUFFOLK U. L. REV. 211, 211 (2008) (observing that a bill that would prohibit height and weight discrimination in employment had been presented to but rejected by the Massachusetts legislature at least ten times). The New York and Texas legislatures rejected measures similar to Michigan’s Elliott-Larsen Act. See Kristen, *supra* note 7, at 100 n.300.

²⁸⁵ See D.C. Human Rights Act, D.C. CODE § 2-1401.02 (2001).

²⁸⁶ See SANTA CRUZ, CAL., MUN. CODE § 9.83.010 (1995); S.F., CAL., CODE Chs. 12A–C (1999); S.F., CAL., POLICE CODE art. 33 (1994). The San Francisco law liberally defines height as “encompass[ing] but . . . not limited to an impression of a person as tall or short regardless of numerical measurement.” City & County of San Francisco Human Rights Commission, Compliance Guidelines to Prohibit Weight & Height Discrimination § II.B (2001), available at http://www.sfgov.org/site/sfhumanrights_page.asp?id=5911.

²⁸⁷ For example, a discrimination investigator with the San Francisco Human Rights Commission could not find a single complaint alleging height discrimination since the city passed the law. See E-mail from Holy Old Man Bull (formerly known as Marcus de Maria Arana), Discrimination Investigator, San Francisco Human Rights Commission (Jan. 27, 2009, 19:03:47 EST) (on file with author). Likewise, the Assistant Director of the City of Santa Cruz Human Resources Department could not recall a single complaint or record filed under the ordinance alleging height discrimination. See E-mail from Joe McMullen,

even fewer have been successful.²⁸⁸ Part of the problem may be, as mentioned above, that height discrimination tends to be implicit, rarely manifesting in overtly discriminatory conduct. Thus, victims of height discrimination either may not realize they are being discriminated against or may not be able to amass sufficient evidence of discriminatory motive. Another part of the problem may be that some misapprehend what these laws actually protect against. For example, given that Michigan's law was passed almost contemporaneously with the Supreme Court's decision in *Dothard v. Rawlinson*,²⁸⁹—which held that an Alabama statute that imposed minimum height and weight requirements on prison guards violated Title VII because it disqualified over 40 percent of female applicants but less than 1 percent of male applicants²⁹⁰—some might mistake that law's solicitude of height as just another (i.e., less onerous) way to allege a gender-based disparate impact claim.²⁹¹ And yet another part of the problem might be that these jurisdictions have instituted protections against height discrimination merely to put themselves in the “vanguard of anti-discrimination,” without any genuine or practical concern for height-based discrimination in the workplace.²⁹²

Assistant Dir., City of Santa Cruz Human Res. Dep't (Jan. 13, 2009, 12:47:18 EST) (on file with author).

²⁸⁸ There appears to be only one case of record in which a plaintiff alleging a claim of height discrimination prevailed under District of Columbia law. *See Coleman v. District of Columbia*, 700 A.2d 232, 233 (D.C. 1997). In Michigan, which has prohibited height discrimination since 1976, most of the mere handful of height-based cases litigated have failed because of pleading deficiencies or the absence of evidence establishing discriminatory motive. *See, e.g., Terry v. DaimlerChrysler Corp.*, No. 263339, 2005 Mich. App. LEXIS 3202, at *4–5 (Mich. Ct. App. Dec. 20, 2005) (finding no direct evidence of discrimination where the plaintiff testified that *she* thought she was too short for the job to which she was assigned while admitting that management personnel told her they thought she could do the job); *Berry v. Way Bakeries, Inc.*, No. 248841, 2005 Mich. App. LEXIS 459, at *11–13 (Mich. Ct. App. Feb. 22, 2005) (finding that plaintiff was properly terminated, in spite of her short stature, because plaintiff's height affected her ability to perform certain tasks and gave rise to safety concerns). However, plaintiffs have successfully brought more “traditional” claims premised on height. *See, e.g., Roskamp v. Cigna Sec., Inc.*, Civ. A. No. 89-60122, 1989 U.S. Dist. LEXIS 17850, at *1–3 (W.D. Mich. Sept. 28, 1989) (denying employer's motion for summary judgment where pseudo-achondroplastic dwarf alleged that he was not hired because of his height); *Micu v. City of Warren*, 382 N.W.2d 823, 827–28 (Mich. Ct. App. 1985) (finding fire department could not discriminate on the basis of height in hiring firefighters unless it established height as a bona fide occupational qualification).

²⁸⁹ 433 U.S. 321 (1977). Michigan's Elliott-Larsen Act was enacted in 1976 and became effective March 31, 1977. *Dothard* was argued in April 1977 and decided in June 1977.

²⁹⁰ *Dothard*, 433 U.S. at 329–31.

²⁹¹ *Cf. Kristen*, *supra* note 7, at 101 (“Michigan's Ombudsman commented that one reason height . . . [was] added to the law was that ‘certain height . . . characteristics tend to be linked to certain ethnic groups or to women.’”).

²⁹² *Cf. E-mail from Joe McMullen*, Assistant Dir., City of Santa Cruz Human Res. Dep't. (Jan. 13, 2009, 20:31:32 EST) (on file with author) (“The City Manager recalls that

B. Why a Federal Prohibition on Height Discrimination Is Unnecessary

As discussed above, gender- and disability-based theories under existing federal law provide protection against many cases of height discrimination—but neither theory is perfect. The gender-based theory would substantially protect short men and tall women, leaving short women, tall men, and all people of average height with no protection. A disability-based theory would only protect people whose height falls outside the “normal range” and those whose short stature an employer perceives as an impairment, but would not protect the vast majority of people.

Nevertheless, these two theories *do* capture the two most significant prejudices underlying height discrimination. The question remains, what should be done, if anything, about height-based employment decisions involving everyone else? A flat federal prohibition on height-based employment decisions first comes to mind.

1. Such a Prohibition Would Be Overinclusive

Although height is an immutable trait—and despite the fact that antidiscrimination laws are premised, at least in part, on the notion that arbitrary decisions based on immutable traits are unfair and immoral²⁹³—not all height-based employment decisions are motivated by prejudice. Thus, a flat federal prohibition on height-based employment decisions, while being the easiest to administer, would be overinclusive. After all, an employer is generally free to prefer certain traits to others so long as that preference does not rise to the level of impermissible prejudice.²⁹⁴

Still, some federal antidiscrimination laws, such as Title VII, overinclude by prohibiting trait-based employment decisions that may not actually be motivated by prejudice.²⁹⁵ That is, Title VII prohibits the consideration of covered traits in *all* their variations and renders everyone a member of the protected class: its protections extend not only to minorities who are most likely to be victims of

the City Council wanted to be in the vanguard of anti-discrimination, but that there was not an event or anything that occurred that they were responding to [in passing the law].”); Kubilis, *supra* note 284, at 225 (quoting the Michigan’s Ombudsman as saying that “[t]here wasn’t even much debate about [passing the Elliot-Larsen Civil Rights Act]” and that the law passed with ease).

²⁹³ See ZIMMER, *supra* note 149, at 31.

²⁹⁴ See *id.*; see also *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 490 (1999) (“By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria.”).

²⁹⁵ *Cf. City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (“The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 334 (1966))).

prejudice, but to *everyone*. Thus, Congress has implicitly determined that the price of overinclusion is justified because the distinction between invidious prejudice and benign preference as to Title VII's covered traits may be too subtle to be trusted.

Conversely, some federal antidiscrimination laws, like the Age Discrimination in Employment Act of 1967 (ADEA)²⁹⁶ and the ADA, are carefully circumscribed to prohibit consideration of specified traits only in *limited* cases, protecting only certain subgroups of people sharing a common trait. For example, although everyone has an "age," the ADEA only prohibits an employer from considering the age of those who are at least 40 years old because, according to Congress, such older employees are most likely to be victims of prejudice.²⁹⁷ As such, younger employees are not protected even though they share the common trait of "age" with protected employees. Similarly, although millions of people may be classified as "impaired," protections under the ADA extend only to employees whose impairments rise to the level of a disability; those who merely have impairments that do not qualify as disabilities are not protected, even though they share the common trait of "impairment" with those covered by the statute.²⁹⁸ Thus, Congress has implicitly determined that the price of overinclusion as to these traits is not justified because the prejudice-preference distinction can be clearly drawn with respect to these traits.

2. *Overinclusion Would Not Be Justified*

So how does one determine whether the price of overinclusion is justified? A useful shortcut may be the Equal Protection Clause itself. Classifications based on certain traits receive heightened scrutiny under the clause.²⁹⁹ These include all of those traits covered by Title VII: race, religion, national origin, color, and gender.³⁰⁰ Under heightened scrutiny, classifications based on these traits are presumptively invalid.³⁰¹ However, classifications based on traits such as age and

²⁹⁶ 29 U.S.C. §§ 621–34 (2006).

²⁹⁷ *See id.* § 621(a)(1) ("The Congress hereby finds and declares that . . . in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs.").

²⁹⁸ *See supra* Part IV.A.

²⁹⁹ *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 539–42 (3d ed. 2006).

³⁰⁰ *See generally id.* at 541–42, 671 (describing strict scrutiny).

³⁰¹ *See id.* at 541–42 (observing that the proponent of the law, i.e., the government, bears the burden of proving the validity of the law under intermediate and strict scrutiny review); *see also* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.

disability receive mere rational basis review and are presumptively valid;³⁰² they need only be rational to survive.³⁰³ Put simply, the level of overinclusiveness tolerated of a federal antidiscrimination law ostensibly coincides with the review given to the traits covered by that law under the Equal Protection Clause.

This brings us full circle. Whether the costs of a flat prohibition on height-based employment decisions would be justified, despite its overinclusiveness, depends on the level of scrutiny a court would apply to height under the Equal Protection Clause. Based on precedential and pragmatic considerations, however, height need not receive heightened review, and, thus, any law prohibiting height discrimination could not broadly prohibit all height-based considerations in employment.

When deciding whether to apply heightened scrutiny to a given classification, the Supreme Court has generally favored (1) immutable characteristics, (2) groups traditionally unable to protect themselves through the political process, and (3) groups with a history of being discriminated against.³⁰⁴ Although height is surely immutable, as an abstract trait it does not constitute a “discrete and insular minorit[y],”³⁰⁵ and thus generally fails to satisfy the second and third factors.³⁰⁶ From a practical standpoint, moreover, the Supreme Court has not seen fit within the past 30 years to broaden the categories of classifications receiving heightened scrutiny.³⁰⁷ The Court’s decision in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*,³⁰⁸ succinctly captures the essence of the Court’s reluctance. When faced with the plaintiffs’ request to treat mental retardation as a quasi-suspect classification entitled to heightened scrutiny, the Court declined, observing that

For these reasons, and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny, and will be sustained only if they are suitably tailored to serve a compelling state interest.”).

³⁰² See generally *Kimel v. Fla. Bd. of Regents*, 582 U.S. 62, 83–84 (2000) (discussing discrimination based on age); *City of Cleburne*, 473 U.S. at 446 (discussing discrimination based on disability).

³⁰³ See CHEMERINSKY, *supra* note 299, at 540 (noting that, under rational basis review, the opponent of the law has the burden of proving its invalidity).

³⁰⁴ See *id.* at 672–73.

³⁰⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

³⁰⁶ However, it may very well be that short people lack political power commensurate with their numbers among the general population. See *supra* notes 15–19 and accompanying text (observing the paucity of short presidents); cf. CHEMERINSKY, *supra* note 299, at 672 (“Women, for example, are more than half the population, but traditionally they have been severely underrepresented in political offices.”).

³⁰⁷ See CHEMERINSKY, *supra* note 299, at 672.

³⁰⁸ 473 U.S. 432 (1985).

[i]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who perhaps have immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. *But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation.* Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us.³⁰⁹

Put simply, height-based classifications would and should only receive rational basis review.³¹⁰ To be sure, there may be circumstances where the government invidiously classifies on the basis of height (as it has with disability); but, such classifications are likely to fail even under the least rigorous rational basis review.³¹¹

Because height-based classifications would receive rational basis review under the Equal Protection Clause, any federal law prohibiting height-based employment decisions would have to be narrowly drawn to address only those employment decisions motivated by a height-based prejudice. Such a narrowly drawn prohibition would necessarily cover short people of all genders, and tall women. However, these groups are already protected, albeit somewhat crudely,

³⁰⁹ *Id.* at 445–46 (emphasis added). The Court went on to note that “mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and . . . we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.” *Id.* at 446. Ultimately, the Court invalidated the classifications as lacking a rational relation to a legitimate government purpose. *See id.* at 450.

³¹⁰ *See* *Ekerman v. City of Chicago*, Civ. A. No. 01-9686, 2002 U.S. Dist. LEXIS 8711, at *9 (N.D. Ill. May 16, 2002) (“Employment decisions based solely on height do not violate the equal protection clause; neither can a coworker’s mere recognition of a plaintiff’s physical stature.” (citing *Dothard v. Rawlinson*, 433 U.S. 321 (1977))).

³¹¹ *See, e.g., City of Cleburne*, 473 U.S. 432, 447–50; *Romer v. Evans*, 517 U.S. 620, 632 (1996) (finding unconstitutional Colorado’s Amendment 2—which effectively prohibited the passing of antidiscrimination laws protecting homosexuals—because “its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests”).

under existing federal laws: short men under the ADA and Title VII; short women under the ADA; and tall women under Title VII.³¹² As such, any new federal law prohibiting height-based employment decisions would be redundant. Moreover, passing such a sweeping law would be practically and politically problematic, given increasing aversion to the expansion of antidiscrimination laws.³¹³

C. A Proposal

Although a federal bar on height-based employment decisions would be gratuitous, modest changes to the regulations and interpretive guidance covering Title VII and the ADA would help to clarify the scope and contours of those laws' protections with respect to height. A change in the regulations, moreover, is preferable to a change in the statutes themselves because the federal rulemaking process is less political and more flexible than the legislative process.³¹⁴

For example, 29 C.F.R. pt. 1630, App. § 1630.2(h) states that "'impairment' does not include physical characteristics such as . . . height, weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder." As noted above, however, most courts have read this to mean that height cannot constitute an impairment on its own if not caused by a physiological disorder.³¹⁵ Although the EEOC has not adopted such a narrow view in its Interpretive Manual,³¹⁶ the regulation itself could be rephrased to make the disjunctive nature of the exclusion more evident. Thus, 29 C.F.R. pt. 1630, App. § 1630.2(h) could be amended to read that "'impairment' does not include physical characteristics such as . . . height . . . that are *either* within 'normal' range *or* are not the result of a physiological disorder." Such a simple change to the regulation would counteract the bulk of pre-ADAAA cases that wrongly read the regulations to prohibit claims premised on height, and would permit height-based claims to proceed beyond motions to dismiss, where so many discrimination plaintiffs lose now that the Supreme Court has made federal pleading requirements more rigorous.³¹⁷

³¹² See *supra* Parts III, IV.2.

³¹³ Consider the backlash against the Massachusetts bill that would outlaw height and weight discrimination. See generally Kubilis, *supra* note 284, at 229–30 (describing resistance to the bill); see also Editorial, *Don't Bloat Books with Pointless Laws*, BOSTON HERALD, Mar. 25, 2008, at 18 ("Yes, it is a sad thing if a person who is short or obese feels the sting of cruel comments. But to equate that with the legacy of racial or gender discrimination in the workplace is simply insulting."); cf. ZIMMER, *supra* note 149, at 32–33 (listing arguments against antidiscrimination laws).

³¹⁴ See WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE & PRACTICE 48–49 (3rd ed. 2006) (describing the procedures necessary for agency rulemaking).

³¹⁵ See *supra* notes 169, 181–191 and accompanying text.

³¹⁶ See *supra* note 169.

³¹⁷ See generally Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (forthcoming 2009) (observing that more than 80 percent of motions to dismiss decided between six and twelve months after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), were at least

In addition, state and local governments should consider extending protections against height-based prejudice in the workplace, even if such protections have not been widely invoked by plaintiffs in those jurisdictions that have enacted such protections.³¹⁸ Jurisdictions that decide to pass such laws should consider explicitly but conservatively expanding protections beyond those offered by the federal laws. For example, a state law typifying an extreme deviation in height as an impairment might do well to broaden the definition to height at or below the third percentile, ensuring that victims at the margin of the clinical definition of profound short stature are not left unprotected.

Of course, jurisdictions could also adopt sweeping protections against height-based employment decisions, such as those enacted in Michigan and the District of Columbia, if they determine that such protections are worth their commensurate costs. After all, the availability of state and local prohibitions may actually decrease litigation by increasing the frequency of mediation and negotiation.³¹⁹ Moreover, having access to multiple court systems would help to more evenly distribute the burden of resolving height-based discrimination claims (if such claims become fashionable). Ultimately, a victim of height discrimination should have at his or her disposal a full panoply of remedies, both federal and other, when he or she decides to challenge heightism that has adversely affected him or her at work.

VI. CONCLUSION

Heightism does exist, and its effects in the employment context are undeniable, even if its causes are less obvious. Many victims of height discrimination have tried in earnest to challenge the adverse treatment they faced because of their stature, and many have failed. Nevertheless, discrimination claims premised on height remain viable under both Title VII and the ADA.

partially granted, compared with 75 percent prior to *Twombly*); Nathan Koppel, *Job Discrimination Cases Tend to Fare Poorly in Federal Court*, WALL ST. J., Feb. 19, 2009, at A16 (observing that “federal judges also now routinely terminate employment-discrimination cases through motions to dismiss, meaning that the plaintiffs aren’t allowed to conduct fact finding to support their claims”). In *Twombly*, the Supreme Court raised the pleading standard that applies to federal complaints, now requiring that “[f]actual allegations . . . be enough to raise a right to relief above the speculative level” 550 U.S. at 555. Subsequently, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Supreme Court clarified the scope of its decision in *Twombly*, stating that “Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions” and holding that Rule 8 is satisfied only “where the well-pleaded facts . . . permit the court to infer more than the mere *possibility* of misconduct” 129 S. Ct. at 1950 (emphasis added).

³¹⁸ See *supra* notes 287–292 and accompanying text.

³¹⁹ Cf. Kubilis, *supra* note 284, at 232–33 (describing the salutary effects caused by the Michigan, Santa Cruz, and San Francisco laws).

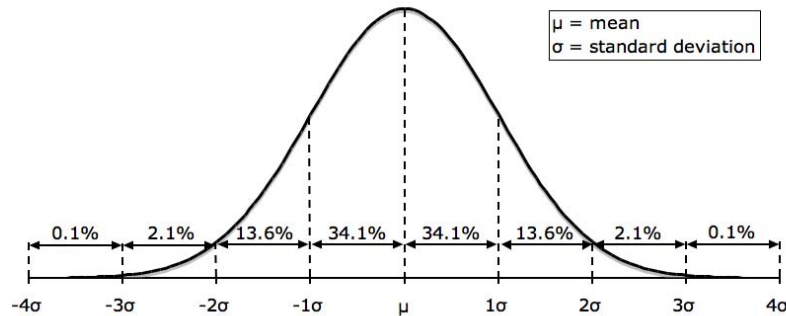
Discrimination against short men and tall women because of their height may constitute discrimination on the basis of a gender stereotype; employment decisions motivated by such stereotypes are unlawful. Discrimination against the profoundly short (i.e., those at or below the 2.5 percentile) because of their stature is likewise impermissible. Recent changes to the ADA, coupled with a fresh look at the regulatory scheme, suggests pre-ADAAA cases were wrong in summarily concluding that height-based discrimination is not actionable under the ADA.

In the end, federal law should prohibit height-based employment decisions motivated by prejudice, but a comprehensive law would be unfeasible. The fact is that existing federal law already prohibits the vast majority of cases involving such prejudice, and the costs of expanding federal law to ban all height-based employment decisions outweigh the benefits of such expansion. Nevertheless, modest amendments to the federal regulations—as well as the passing of protections against height discrimination by state and local governments—would go a long way in preventing this form of invidious prejudice.

*“Short People are just the same
As you and I
(A Fool Such As I)
All men are brothers
Until the day they die
(It’s A Wonderful World).”*³²⁰

³²⁰ NEWMAN, *supra* note 1.

APPENDIX

Figure 1 – Standard Deviation**Table 1 – Mean Standing Height in Inches for All Males Age 20 and Older: United States, 1999–2002³²¹**

Age (in years)	Mean	Percentile								
		5th	10th	15th	25th	50th	75th	85th	90th	95th
20 and older	69.3	64.1	65.4	66.2	67.3	69.3	71.3	72.3	73.1	74.2
20-29	69.6	64.1	65.7	66.5	67.5	69.6	71.4	72.6	73.5	74.6
30-39	69.5	64.2	65.7	66.3	67.4	69.3	71.6	72.6	73.3	74.4
40-49	69.7	65.1	66.1	66.7	67.7	69.6	71.7	72.6	73.2	74.4
50-59	69.2	64.0	65.4	66.2	67.2	69.3	71.4	72.3	73.0	73.9
60 -69	68.8	64.4	65.1	65.8	67.0	68.9	70.7	71.7	72.3	73.1
70-79	68.0	63.0	64.3	64.9	65.9	68.1	70.1	71.0	71.5	72.5
80 and older	67.2	62.8	63.7	64.5	65.4	67.1	69.0	70.0	70.6	71.7

³²¹ Data derived from Margaret A. McDowell et al., *Anthropometric Reference Data for Children and Adults: U.S. Population, 1999–2002*, at 6 (Centers for Disease Control: Advance Data From Vital Health Statistics, No. 361, July 7, 2005), available at <http://www.cdc.gov/nchs/data/ad/ad361.pdf>.

**Table 2 – Mean Standing Height in Inches for All Females Age 20 and older:
United States, 1999–2002³²²**

Age (in years)	Mean	Percentile								
		5th	10th	15th	25th	50th	75th	85th	90th	95th
20 and older	63.8	59.4	60.3	61.0	62.0	63.8	65.6	66.5	67.3	68.2
20-29	64.1	59.9	60.5	61.4	62.3	64.1	65.8	67.0	67.5	68.4
30-39	64.2	59.9	60.8	61.5	62.4	64.2	65.9	66.9	67.5	68.6
40-49	64.3	59.9	60.8	61.5	62.5	64.3	66.1	67.0	67.6	68.7
50-59	63.9	59.7	60.6	61.3	62.1	63.9	65.5	66.4	67.2	68.1
60-69	63.2	59.0	59.9	60.7	61.6	63.2	64.9	65.8	66.5	67.1
70-79	62.6	58.4	59.1	59.9	61.0	62.6	64.1	65.3	65.8	66.6
80 and older	61.3	57.4	58.1	58.9	59.8	61.4	62.8	63.7	64.4	65.6

**Table 3 – Stature-for-Age Percentiles
for Boys Age 20 (Derived from CDC
Growth Charts)³²³**

Percentile	Height (in inches)
3rd	64.3
5th	65
10th	66
25th	67.7
50th	69.6
75th	71.5
90th	73.2
95th	74.2
97th	74.9

**Table 4 – Stature-for-Age Percentiles
for Girls Age 20 (Derived from CDC
Growth Charts)³²⁴**

Percentile	Height (in inches)
3rd	59.5
5th	60.1
10th	61.0
25th	62.6
50th	64.3
75th	66.0
90th	67.6
95th	68.5
97th	69.1

³²² *Id.*

³²³ *See* CDC, CDC Growth Charts: United States, available at <http://www.cdc.gov/growthcharts>. Raw percentile data can be accessed at <http://www.cdc.gov/nchs/data/nhanes/growthcharts/zscore/statage.xls>.

³²⁴ *Id.*